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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 803

DALLAS SELLS and
COMMITTEE ON POLITICAL EDUCATION,
Appellants,

v.

MATTHEW WELSH, as Governor of The State of Indiana and as a Member of the Indiana Revenue Board,
JAMES C. COURTNEY, as Revenue Commissioner of the State of Indiana,
EDWIN K. STEERS, as Attorney General of the State of Indiana,
ROBERT HUGHES, Treasurer of The State of Indiana, and
DOROTHY GARDNER, Auditor of The State of Indiana, as Members of the Indiana Revenue Board, and
INDIANA DEPARTMENT OF STATE REVENUE,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF INDIANA

JURISDICTIONAL STATEMENT

LLOYD L. DEWESTER, JR.,
900 Circle Tower,
Indianapolis, Indiana,
Attorney for Appellants.

Central Publishing Company, Inc., Indianapolis, Ind

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Appellees.

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JURISDICTIONAL STATEMENT

Appellants appeal from the final judgment of the Supreme Court of Indiana, entered October 2, 1963, reversing the Marion Circuit Court and entering judgment for Ap-

pellees in an action by Appellants for a judgment declaring the Indiana Sales and Use tax statute unconstitutional and to enjoin enforcement of such statute. This statement is submitted to show that the Supreme Court of the United States has jrusidiction of this appeal and that substantial federal questions are presented.

OPINIONS BELOW

The opinion of the Supreme Court of Indiana is not yet officially reported but is unofficially found at 192 N. E. (2d) 753. Such opinion was later modified and the modified opinion is attached as Appendix A. The Supreme Court of Indiana also issued an opinion denying Appellants' petition for rehearing and an opinion overruling Appellants' motion for leave to file amended petition for rehearing and for stay. These opinions are not yet officially reported but are unofficially found at 193 N. E. (2d) 359, and attached hereto as Appendix B and Appendix C.

JURISDICTION

The action was brought pursuant to the Indiana Acts of 1927, Chapter 81, Secs. 1 through 16 [Burns' Indiana Statutes Annotated (1946 Replacement, Vol. 2 Part 2) Secs. 3-1101 to 3-1116] for a judgment declaring the Indiana sales and use tax statute unconstitutional and for injunctive relief.

Final judgment of the Supreme Court of Indiana was entered on October 2, 1963. Appellants filed a petition for rehearing, pursuant to Rule 2-22 of the Rules of the Supreme Court of Indiana. Such petition was denied on October 23, 1963, and, on the same date, Appellants filed a motion for leave to file amended petition for rehearing and for stay. The motion was overruled on October 30, 1963. Notice

of Appeal was filed on December 13, 1963, in the Supreme Court of Indiana.

Jurisdiction of the Supreme Court of the United States to hear this appeal rests upon 28 U.S.C. Sec. 1257 (2) and is sustained by the following decisions:

New York ex rel. Bryant v. Zimmerman (1928), 278 U. S. 63, 49 S. Ct. 61, 73 L. Ed. 184;

Western & Atlantic Railroad Co. v. Henderson (1929), 279 U. S. 639, 73 L. Ed. 884, 49 S. Ct. 445;

Hurtado v. California (1884), 110 U. S. 516, 28 L. Ed. 232, 4 S. Ct. 292;

Quaker City Cab Co. v. Pennsylvania (1928), 277 U. S. 389, 72 L. Ed. 930, 48 S. Ct. 553.

STATUTE INVOLVED

The state statute involved in this appeal is House Enrolled Act No. 1226, Indiana Acts 1963 (Spec. Sess.), Chapter 30, Sec. 1 through 25 (Burns' Annotated Indiana Statutes, 1963 Special Supplement, Sec. 64-2651 through 64-2667). The full text of this statute (hereinafter called "the Act" or "House Enrolled Act No. 1226") is set forth in Appendix D.

QUESTIONS PRESENTED

The following questions, which are substantially the same as originally set out in the Notice of Appeal, are presented by this appeal:

1. Whether the purported exclusion of evidence, showing that the Act was passed in clear and patent

violation of Article 4, Section 25, Constitution of Indiana, upon the ground that proper authentication of such Act by the presiding officers of the Indiana Legislature conclusively establishes constitutional passage of the Act, in the absence of fraud, deprives Appellants of their property without due process of law, under the Constitution of the United States, Amendment 14, Section 1?

2. Whether passage of the Act, without the vote of a majority of all members elected to both houses of the Indiana General Assembly, as required by Article 4, Section 25, Constitution of Indiana, deprives Appellants of their property without due process of law, under the Constitution of the United States, Amendment 14, Section 1?

3. Whether Section 4 (b) (1) of the Act, which exempts "sales to farmers and other persons," under certain circumstances, from payment of the sales and use tax levied by the Act, deprives Appellants of the equal protection of the laws, under the United States Constitution, Amendment 14, Section 1?

STATEMENT OF THE CASE

Appellant, Dallas Sells, is a citizen and taxpayer of Indiana and president of the Indiana State AFL-CIO. Appellant, Committee On Political Education, is an unincorporated association and one of its stated purposes is to secure for its members and all citizens a fairer system of taxation.

On April 19, 1963, in the waning moments of a special session of the 1963 Indiana General Assembly, House Enrolled Act No. 1226 was purportedly passed by the Indiana Senate. Such Act was not in fact passed by the vote of a majority of the members elected to the Indiana Senate.

The Senate Journal and a wealth of additional evidence will show that but 24 of the 50 members of the Indiana Senate and the Lieutenant Governor, who is not elected to the Senate, voted for the Act. Nevertheless, such Act was signed as passed by the presiding officers of the Indiana Legislature.

Sec. 1 and 6 of this purported Act levy a sales tax of 2% upon transactions of retail merchants, constituting selling of tangible personal property at retail, and a use tax of 2% upon the use, consumption or storage of such property within the State (Appendix D, p. xxxiv, xliii). Such taxes are to be paid by the purchaser, and the retail merchant is directed to collect the taxes as agent for the state (Appendix D, p. xxxiv, xliii) The Act was to become effective on July 1, 1963.

Certain transactions are exempted from imposition of the sales tax by Sec. 4 (b) of the Act (Appendix D, p. xxxix). Sec. 4 (b) (1) specifically exempts:

> Sales to farmers and other persons occupationally engaged in the business of producing food and commodities for human, animal or poultry consumption either for sale or for further use in producing such food and commodities for sale, of animal and poultry life to be used by the purchaser for such production of food and commodities, feed for such animals and poultry, and seeds, plants, fertilizers, fungicides, insecticides and other tangible personal property to be used for such production of food and commodities. (Appendix D, p. xxxix).

How the Federal Questions Arose

Appellants, as taxpayers, filed their complaint, asking for declaratory relief in the first paragraph and for injunctive relief in the second paragraph, on May 10, 1963

(Tr. p. 4, l. 1; Tr. p. 17, l. 27)[1] Question No. 1 and 2 set out above were raised in the first paragraph of complaint. It was alleged that the failure of a majority of all members elected to the Indiana Senate to vote for the Act violated Article 4, Section 25, Indiana Constitution, and was "further violative of the due process clause of the Fourteenth Amendment of the United States Constitution" (Tr. p. 8, l. 21; Tr. p. 9, l. 9). The first paragraph of complaint also raised Question No. 3 set forth above. It was averred that Sec. 4 (b) (1) of the Act exempts "sales to farmers," which violates "the Fourteenth Amendment to the United States Constitution." (Tr. p. 10, l. 23; Tr. p. 11, l. 2). Appellees answered the complaint, on May 22, 1963, and specifically denied these allegations. (Tr. p. 69, ll. 6-8).

Pursuant to a pre-trial order (Tr. p. 72, ll. 2-5), the first paragraph of complaint was submitted for trial on June 10, 1963. During this hearing, Appellants offered to prove that the Act was not passed by a majority of all members elected to the Indiana Senate (Tr. p. 115, ll. 19-27). Appellees objected (Tr. p. 115, ll. 10-13) and the trial court excluded the evidence (Tr. p. 116, ll. 1-2).

On June 14, 1963, the trial court entered its decree, declaring House Enrolled Act No. 1226 unconstitutional, citing numerous state constitutional reasons (Tr. p. 1, l. 1; Tr. p. 87, l. 7). On June 19, 1963, the cause was submitted for trial on the second paragraph of complaint, and Appellees were permanently enjoined from enforcing the Act (Tr. p. 88, l. 1; Tr. p. 99, l. 20). On the same date, the Attorney General of the State of Indiana withdrew his appearance for Appellees, (Tr. p. 90, ll. 1-2) and private counsel appeared for Appellees, Matthew Welsh and James C. Courtney (Tr. p. 92, ll. 1-24).

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1. References to the certified transcript of record will be so shown.

On June 20, 1963, Appellees filed a motion for new trial, alleging that the decision of the trial court was contrary to law, which motion was overruled on the same date (Tr. p. 101, l. 1; Tr. p. 103, l. 11). Appellees filed their Praecipe for Transcript on June 20, 1963 (Tr. p. 104, l. 1; Tr. p. 108, l. 3) and tendered their Bill of Exceptions, on June 28, 1963, which bill was approved (Tr. p. 109, l. 1; Tr. p. 110, l. 18). On July 11, 1963, Appellees filed their Transcript of Record with the Clerk of the Supreme Court of Indiana, assigning as error the overruling of the motion for new trial (Tr. p. 1, l. 1; Tr. p. 2, l. 10).

Pursuant to Rule 2-6 of the Rules of the Supreme Court of Indiana, Appellants assigned cross-errors on August 6, 1963, averring that the trial court erred in excluding evidence showing that House Enrolled Act No. 1226 was not passed by a majority of the elected senators (Tr. p. 1A). Questions No. 1 and 2 were thereby placed squarely before the Supreme Court of Indiana.

Appellees anticipated such assignment of cross-error. Accordingly they stated the claims presented by questions 1 and 2 in their brief filed in the Supreme Court of Indiana, on July 16, 1963, as follows:

> "Such alleged failure to have a majority of all members elected and voting for the Act is also claimed to violate the 14th Amendment to the Constitution of the United States of America."[2]

Appellees further acknowledged that question No. 3 was before the Supreme Court of Indiana in their brief filed in that Court. They stated:

> "Paragraphs 8 (e), (g) and (h) of the first paragraph of complaint charge that the Act is discrimina-

2. There are no record references applicable to brief quotations.

> tory * * * and that it thereby contravenes * * * the 14th Amendment to the Constitution of the United States."

Paragraph 8 (b) of the first paragraph of complaint charges, as noted above, that the exemption of Sec. 4 (b) (1) of the Act violates the 14th Amendment to the Constitution of the United States (Tr. p. 10, l. 23; Tr. p. 11, l. 2).

In its opinion, the Supreme Court of Indiana noted that the claim presented by question No. 1 and 2 was before the Court by an assignment of cross-errors. The Court said:

> "It is further urged that there were irregularities in the adoption of the Act in the legislature. This question is presented by an assignment of cross-errors on the ground that the trial court erred in excluding evidence as to the procedure followed in the enactment of the bill by the legislature." (Appendix A, P. ix).

The Supreme Court held against the claim, asserting the following reason:

> "* * * this court has consistently held that the proper authentication of an enrolled Act is proof of its proper enactment, with the exception that fraud practiced upon the legislature or its presiding officers would vitiate the certification."
>
> "No fraud of that character is charged in this case." (Appendix A p. x)

Thus, Appellants' claim presented by Question No. 1 and 2 was denied because there was no evidence of fraud practiced upon the presiding officers of the legislature.

With respect to the claim presented by question 3, the Supreme Court of Indiana summarily denied the claim, holding:

> The section [(4) (b) (1) of the Act] is not discriminatory. It merely places a farmer and like persons engaged in the production of food for consumption in the category of certain manufacturers who are also exempted under the Act. (Appendix A, p. xiv).

Appellants vigorously urged the claim presented by question No. 1 and 2 in their petition for rehearing, filed on October 22, 1963, and said:

> "The exclusionary rule * * * preventing the consideration of the evidence in the record concerning the manner of passage of the Act, once such Act was properly authenticated, which rule was applied by the trial court and adhered to by this court, arbitrarily and unreasonably denied said Appellees a fair hearing based upon all relevant evidence, and, further, the fact that this Act was passed in violation of Article 4, Section 25 of the Indiana Constitution, will deprive said Appellees of their property, without due process of law, all of which violates Section 1 of the 14th Amendment to the Constitution of the United States."

And the Attorney General of the State of Indiana, having filed a brief as Attorney General and party Appellee, urged the claim presented by questions 1 and 2 in his petition for rehearing, filed October 22, 1963. He stated:

> "Said decision and opinion is violative of the United States Constitution, Amendment 14, Sec. 1, in not holding that the purported enactment of House Bill 1226, contrary to the Indiana Constitution, Art. 4, Sec. 25, violates the requirement of due process of law guaranteed to all citizens of the United States * * *."

The Supreme Court of Indiana again denied the claims, holding that "the record in fact does *not* contain the Senate Journal" (Appendix B, p. xxix). The Senate Journal,

of course, shows that the Act was passed by less than a majority of all members elected to the Indiana Senate.

Thereafter, Appellants filed a motion for leave to file amended petition for rehearing and for stay on the ground that Appellants were prejudiced and mislead in preparing their petition for rehearing because they believed that the court had taken judicial notice of the vote in the Senate Journal.

The Indiana Supreme Court overruled the motion, and said in its opinion:

> "Even if we assumed, either through judicial notice or that the record in the trial court below showed the vote in the Senate Journal to be 25 ayes and 24 noes for the bill in question, we would still be compelled to deny the Appellees' contention * * *." (Appendix C, p. xxxii)
>
> "* * * this court will not go behind a properly authenticated certificate of the presiding officers of the two houses of the legislature that a bill has been duly enacted, except in the case of fraud as previously stated in our opinion." (Appendix C, p. xxxiii).

It should be noted that there is evidence in the record showing that the Act did not receive a majority of the votes of all members elected to the Indiana Senate. During the trial of this cause, Appellants' verified complaint was admitted and read into evidence over the objection of Appellees (Tr. p. 129, l. 23; Tr. p. 145, l. 27). Subparagraph 8 (e) of the complaint (Plaintiffs' Exhibit No. 2) reads:

> "* * * such failure to have a majority of all members elected and voting on the supposed Act in question being further violative of the due process clause of the Fourteenth Amendment to the United States Constitution." (Tr. p. 136, ll. 12-15).

This evidence stands uncontradicted in the record.

At any rate, the pleadings, the briefs, assignment of errors and cross-errors as well as the petitions for rehearing all combine to show that the federal constitutional claims, asserted herein, arose at the beginning of this case, and were brought to the attention of the Supreme Court of Indiana with fair precision and in due time. The decision of the Indiana Supreme Court is clearly against the federal claims, though not stated in direct terms. Under these circumstances, this Court has held that the federal claims are to be regarded as having been adequately presented.

New York ex rel. Bryant v. Zimmerman (1928), 278 U. S. 63, 73 L. Ed. 184, 49 S. Ct. 61;

Braniff Airways v. Nebraska State Board (1954), 347 U. S. 590, 98 L. Ed. 967, 74 S. Ct. 757.

THE QUESTIONS ARE SUBSTANTIAL

The questions will be discussed in the same order as was used under the heading "Questions Presented." Question No. 1 and 2 will be combined.

Questions 1 and 2

Art. 4, Sec. 25, Constitution of Indiana, requires:

> "A majority of all members elected to each House, shall be necessary to pass every bill or joint resolution * * *."

In its original opinion, the Supreme Court of Indiana, admitted House Enrolled Act No. 1226 was passed in violation of this requirement. The Court said:

> "The gist of the question presented is that the Senate Journal shows that the bill did not receive 'a ma-

> jority of all members elected to the Senate, as provided in Article 4, Section 25 of the Constitution of Indiana. This record reveals that after the bill was amended radically at a conference of both houses, it was returned to the Senate and upon a vote 25 ayes and 24 noes, the conference report was approved and the bill was then signed by the presiding officers of the respective houses as passed * * *."[3]

On rehearing, however, the Indiana Supreme Court deleted the language "This record reveals * * *.", substituted therefor, "Appellees contend that the Senate Journal shows * * *." (Appendix A, p. ix), and held "* * * the record in fact does *not* contain the Senate Journal * * *." (Appendix B, p. xxix). On motion for leave to file amended petition for rehearing and for stay, the Court reemphasized its original holding. It said:

> "Even if we assumed * * * the vote in the Senate Journal to be 25 ayes and 24 noes for the bill in question, we would still be compelled to deny Appellees' contention * * *." (Appendix C, p. xxxii).
>
> "* * * this court will not go behind a properly authenticated certificate of the presiding officers of the two houses of the legislature that a bill has been duly enacted, except in the case of fraud as previously stated in our opinion." (Appendix C, p. xxxiii.)

And the Indiana Supreme Court was quite clear about its meaning of "fraud." It stated evidence would be considered only if "the Speaker of the House and the President of the Senate were defrauded into signing a bill which had never been passed by both houses of the General Assembly" (Appendix A, p. x).

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3. See motion for leave to file amended petition for rehearing and for stay, filed in the Supreme Court of Indiana, on October 23, 1963.

Thus, the holding of the Indiana Supreme Court substitutes a judicial presumption for the constitutional requirements of passage of a bill. Notwithstanding the true facts concerning passage, only three signatures are necessary to pass a bill into law—the presiding officers of each of the two houses and the Governor's.

The dangers inherent in such judicial presumption were concisely stated by Justice Murray, in *Fowler v. Pierce* (1852), 2 Cal. 165, as follows:

> "And why should not the citizen whose life, property, or liberty is made forfeit by the operation of a particular law, be allowed to show to the Court, if it is not advised of the fact, that the same was passed in violation of his constitutional rights, or that it has been placed among the archives of government by fraud or mistake, and never had a legal existence. Is there no way of ascertaining whether the approval of the executive was forged, or whether officers acted contrary to their constitutional obligations? It is no sufficient answer that we must rely on the integrity of the executive or other officers, and that the record of facts is conclusive evidence of the truth of such acts. Our notions of free institutions revolt at the thought of placing so much power in the hands of one man, with no guard upon it but his own integrity; and our constitution has wisely so distributed the powers of government as to make one a check upon the other, thereby preventing one branch from strengthing itself at the expense of the coordinate branches and of the public. Such evidence should be of the most satisfactory character; and there is less to be apprehended from the subornation of witnesses, subject to the tests which the law imposes, than from the exercise of so great a power without restraint or accountability."

Besides the dangers, it is significant that the presumption of proper passage of a bill, once properly signed, can

be rebutted, only if a criminal tricks the presiding officers into signing a bill not passed. Conversely stated, even if a bill is not passed, the presumption of regular passage cannot be rebutted if there was no such fraud. Surely the vindication of fundamental constitutional rights has no reasonable or logical relation to the existence of such an irrelevant circumstance as fraud inducing presiding officers to sign a bill.

Sec. 1, 14th Amendment, United States Constitution, does provide that no state shall deprive any person of property "without due process of law * * *." In *Twining v. New Jersey* (1908), 211 U. S. 78, 100, 53 L. Ed. 97, 29 S. Ct. 14, referring to the phrase "due process of law," it was stated:

> "This Court has always declined to give a comprehensive definition of it, and has preferred that its full meaning should be gradually ascertained by the process of inclusion and exclusion in the course of the decisions of cases as they arise."

Notwithstanding the vagueness and illusiveness of the phrase, certain definite principles have emerged from this empiric process. Thus, in *Western & Atlantic Railroad Co. v. Henderson* (1929), 279 U. S. 639, 73 L. Ed. 884, 49 S. Ct. 445, a state statute created a presumption of negligence upon the part of a railroad if it was proven that a collision had occurred between a train and motor vehicle at a highway grade crossing. The Supreme Court of the United State held this presumption violative of the due process clause of the 14th Amendment. At p. 643 of 279 U. S., this Court said:

> "A statute creating a presumption that is arbitrary or that operates to deny a fair opportunity to repel it violates the due process clause of the 14th Amend-

> ment. Legislative fiat may not take the place of fact in the judicial determination of issues involving life, liberty or property."

To the same effect are:

> *Manley v. Georgia* (1928), 279 U. S. 1, 73 L. Ed. 575, 49 S. Ct. 215;
>
> *Baley v. Alabama* (1911), 219 U. S. 219, 55 L. Ed. 191, 31 S. Ct. 145.

A party of reason requires that a judicial presumption, which is both arbitrary and denies a fair opportunity to repel it, violates the due process clause of the 14th Amendment. What is more arbitrary than requiring proof that someone tricked the presiding officers into signing a bill as a prerequisite to the consideration of evidence that such bill never passed? Judicial fiat should have no better standing than legislative in the determination of issues involving life, liberty or property. The presumption of regular passage of an enrolled Act, rebuttable only by fraud, clearly violates the due process clause of the 14th Amendment under the principles set out in the *Henderson* case.

Another definite principle which has emerged from the empiric process of defining the due process clause of the 14th Amendment is that it refers to and includes the law of the land in each state. In *Hurtado v. California* (1884), 110 U. S. 516, 535-536, 28 L. Ed. 232, 4 S. Ct. 292, due process of law was defined as:

> "* * * that law of the land in each State, which derives its authority from the inherent and reserved powers of the State, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greatest security for which resides in the

> right of the people to make their own laws, and alter them at their pleasure."
>
> "* * * and the limitations imposed by our constitutional law upon the action of the governments, both State and national, are essential to the preservation of public and private rights, notwithstanding the representative character of our political institutions. The enforcement of these limitations by judicial process is the device of self-governing communities to protect the rights of individuals and minorities, as well against the power of numbers, as against the violence of public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of government."

Certainly Art. 4, Sec. 25 of the Indiana Constitution is a part of the law of Indiana, and limits the reserved powers of the Indiana legislature in the passage of laws. Clearly House Enrolled Act. No. 1226, not having received the required votes for passage, is not a law. In fact, the Supreme Court of Indiana so held, in *McCulloch v. State* (1859), 11 Ind. 424, 435, where it said:

> "* * * where the journals, on their face, show that a bill on its passage did not receive, in its favor, a majority of all members elected, as prescribed by the constitution, the whole legislative proceeding would be a nullity."

See also: *Cordell v. State* (1864), 22 Ind. 1.

Thus, the situation is presented where the public officials of the State of Indiana have transcended the limits of lawful authority—they are enforcing a taxing measure, under the guise of a duly enacted law, when such measure was in fact not enacted according to the law of the land.

The purported enactment of House Enrolled Act No. 1226, with less than the required constitutional majority, rendered it a nullity. A flagrant violation of the due process clause, 14th Amendment, United Constitution, is thus presented for this Court's consideration.

Question 3

Section 1 and 6 of the Act respectively levy a 2% sales and use tax, upon transactions of retail merchants constituting selling at retail, which taxes "* * * shall be borne by the purchaser and shall be paid by the purchaser to the retail merchant, who shall collect the tax as agent for the state * * *." (Appendix D, p. xxxiv, xliii.) Retail purchasers are, therefore, the class of persons taxed by House Enrolled Act No. 1226.

Sec. 4 (b) (1) of the Act exempts "Sales to farmers and other persons occupationally engaged in the business of producing food and commodities * * *" from application of the sales tax (Appendix D, p. xxxix). All "* * * tangible personal property to be used for such production of food and commodities" are exempted. (Appendix D, p. xxxix).

As noted above the Indiana Supreme Court rejected the claim that Sec. 4 (b) (1) of the Act violated the equal protection clause, 14th Amendment, United States Constitution. The Court held:

> "It is apparent that the exemption is for the purpose of treating as a wholesale sale the transactions specified and hence the transaction becomes taxable under the gross income tax rather than the retail sales tax. (See Section 3 of the Gross Income Tax Act.) The section is not discriminatory. It merely places a farmer and like persons engaged in the production of food

> for consumption in the category of certain manufacturers who are also exempted under the Act." (Appendix A, p. xiv)

Such reasoning is fallacious. Since the tax is only levied upon retail transactions, and paid by the purchasers, there would be no reason for exempting a wholesale sale since it is not taxed anyway. (See Sec. 1, Appendix D, p. xxxiv). The purpose of the Sec. 4 (b) (1) is to exempt retail sales to farmers. Moreover, the fact that other categories of purchasers are exempted does not render the exemption of farmers from taxpaying purchasers at retail any the less discriminatory.

In *Quaker City Cab Co. v. Pennsylvania* (1928), 277 U. S. 389, 72 L. Ed. 930, 48 S. Ct. 553, a state statute levied a gross receipts tax upon incorporated transportation companies but such tax did not apply to natural persons and partnerships carrying on the same business. Noting that the "character of the owner is the sole fact on which the discrimination are made to depend," this Court, at p. 402 of 277 U. S. held:

> It follows that the section fails to meet the requirement that a classification to be consistent with the equal protection clause must be based on a real and substantial difference having reasonable relation to the subject of the legislation * * *. No decision of this court gives support to such a classification. In no view can it be held to have more than an arbitrary basis.

To the same effect see: *Louisville Gas & Electric Company v. Coleman* (1928), 277 U. S. 32, 72 L. Ed. 770, 48 S. Ct. 423;

Colgate v. Harvey (1935), 296 U. S. 404, 80 L. Ed. 299, 56 S. Ct. 252.

Similarly, though House Enrolled Act No. 1226 levies the tax upon all purchasers of tangible personal property

at retail, such tax does not apply to purchases by farmers and other persons engaged in agriculture solely because they are farmers or are engaged in the production of food. The character of the purchaser is the sole fact upon which the discrimination depends. The exemption, therefore, violates the equal protection clause, 14th Amendment, since it is not based on a real or substantial difference having reasonable relation to the subject of the legislation. Thus, question 3 also presents a substantial question for consideration by this Court.

CONCLUSION

The principle issues presented by this appeal are important not solely because House Enrolled Act No. 1226 levies a sales and use tax upon all purchasers at retail in Indiana, and discriminates against those purchasers by exempting certain sales to farmers and other persons engaged in farming. Far more important is the fact that such purchasers are forced to pay such taxes, even though the law leving the taxes was passed contrary to the law of the land, and, therefore, is not a law. Equally important is the fact that the Courts of Indiana have refused a forum for redress of this grave constitutional wrong. Each of the questions as expressed in Question No. 1, 2 and 3 is substantial in the constitutional sense.

It is respectfully suggested that this Court may find this case an appropriate one for plenary consideration with briefs and oral argument an aid in the proper resolution of the questions it presents.

Respectfully submitted,

LLOYD L. DEWESTER, JR.,
900 Circle Tower,
Indianapolis, Indiana,
Attorney for Appellants.

APPENDIX A

IN THE

SUPREME COURT OF INDIANA

APPEAL FROM THE MARION CIRCUIT COURT
HON. JOHN L. NIBLACK, JUDGE

MATTHEW WELSH, As Governor of the State of Indiana and As A Member of the Indiana Revenue Board, and
JAMES C. COURTNEY, As Revenue Commissioner of the State of Indiana,
Appellants,

v.

DALLAS SELLS,
COMMITTEE ON POLITICAL EDUCATION,
EDWIN K. STEERS, JR., As Attorney General of the State of Indiana,
ROBERT HUGHES, Treasurer of the State of Indiana, and
DOROTHY GARDNER, Auditor of the State of Indiana, As Members of the Indiana Revenue Board,
INDIANA DEPARTMENT OF STATE REVENUE,
Appellees.

No. 30442

PER CURIAM

This is an action brought by appellee Sells on behalf of himself and others similarly situated and by the Committee

on Political Education, an unincorporated association, against James C. Courtney, as Revenue Commissioner of the State of Indiana, Matthew Welsh, as Governor of the State of Indiana, and Edwin K. Steers, as Attorney General of the State of Indiana, for a judgment declaring unconstitutional House Enrolled Act Number 1226, Chapter 30 of the Special Session of the 1963 Indiana General Assembly. This Act amended the Gross Income Tax Act of 1933, as amended (Burns' Statutes §64-2601, et seq.), by imposing a sales tax and a use tax on certain retail transactions and effecting certain changes in the gross income tax. A declaratory judgment and an injunction against enforcement of the Act was asked. Appellant Welsh, as Governor, and appellees Robert Hughes, as State Treasurer, and Dorothy Gardner, as State Auditor, were granted leave to intervene and were made parties defendant as members of the Indiana Revenue Board.

The trial court found and declared the Act to be unconstitutional, with the exception of Sections 21 and 22 thereof (which sections pertain to certain changes in the gross income tax). It entered an order enjoining the appellants and certain appellees from putting into effect or attempting to do so, sales and use tax provisions of the Act. A motion for a new trial was overruled and this appeal followed.

A number of constitutional questions are presented for our consideration. The briefing has been quite voluminous. In many instances we are urged to give consideration to arguments which go more to the merit and expediency of the tax law than to the constitutional questions involved. This court has previously stated:

> "We have no right to go into the merits of the proposed tax. Whether an act is wise or expedient is

a matter for the legislature—not the courts. Those matters have no bearing on the constitutionality of the legislation. Our duty is to measure the constitutionality of the law by the yard stick of the Constitution."

Wright v. Steers, Atty. General, et al. (1961), 242 Ind. 582, 591, 179 N. E. (2d) 721, 726.

If the action of the General Assembly in passing this law is unwise or imprudent, the remedy is at the polls on election day—not in the courts.

We approach a consideration of the constitutional questions here involved, mindful of the limiting principle which controls us, that all reasonable doubt must be resolved in favor of the constitutionality of an act.

"'It is the duty of the court to sustain the constitutionality of an act of the General Assembly if it can be done by a reasonable construction, and any doubt concerning the constitutionality of an act must be resolved in favor of its validity.' 5 Ind. Law Encyc., Constitutional Law, §38, p. 310. State, P.R.R. Co., et al. v. Iroq. Cons. Dist. Ct., et al. (1956), 235 Ind. 353, 356, 133 N. E. (2d) 848; Wright-Bachman, Inc. v. Hodnett, et al. (1956), 235 Ind. 307, 316, 133 N. E. (2d) 713; Fairchild, Prosecuting Atty., etc. v. Schanke, et al. (1953), 232 Ind. 480, 483, 113 N. E. (2d) 159."

Marion County Election Board et al. v. O'Brien, et al. (1960), 241 Ind. 36, 42, 169 N. E. (2d) 287, 289;

Moore v. City of Indianapolis (1889), 120 Ind. 483, 22 N. E. 424.

The proposed tax in question falls within a category of an excise tax upon retail sales transactions as defined in the Act. The complaint herein states that there is no ex-

pressed authority in the Constitution for the enactment of a sales tax. However, the law in this state is well settled in that respect. We have said:

> "The power of legislation of the subject of taxation admits no limitation except where specifically imposed by the Constitution itself."
>
> *The State Board of Tax Commissioners, et al. v. Holiday et al.* (1898), 150 Ind. 216, 219, 49 N. E. 14, 15.

We have further said:

> "It is generally recognized that there is no limitation under the Indiana Constitution as to the number of excise taxes which may be imposed by the legislature."
>
> *Wright et al. v. Steers, Atty. General, et al.* (1962), 242 Ind. 582, 585, 179 N. E. (2d) 721, 723.

It is next contended that the title of the Act contravenes Article 4, Section 19 of the Constitution of this state, since it does not notify retail purchasers that they shall "pay such taxes." It is additionally urged that the title does not specifically contain the words "sale tax" nor state that the tax is imposed on purchasers.

The title to the Act is as follows:

> "AN ACT to amend an Act entitled 'an Act to provide for the raising of public revenue by imposing a tax upon the receipt of gross income, to provide for the ascertainment, assessment and collection of said tax, and to provide penalties for violation of the terms of this Act and declaring an emergency,' being Chapter 50 of the Acts of 1933, as last amended by Chapter 293 of the Acts of 1961, to impose an additional excise tax on transactions of retail merchants constituting selling at retail and an additional excise tax

on the use, storage or other consumption of tangible personal property in this state, redefining certain transactions constituting selling at retail for the imposition of such additional taxes, repealing the storelicense tax, amending the title thereto, increasing certain gross income tax rates, revising certain exemptions, providing an additional credit and declaring an emergency."

We have considered all these questions in cases previously before this court. We have said that a title need not be a complete index or abstract of the entire act.

Orbison v. Welsh, Governor, et al. (1962), 242 Ind. 385, 179 N. E. (2d) 727.

We have further said:

"The usual test applied in such a case is whether or not the title of the act is misleading or fails to give fair notice of its contents."

Martin v. Ben Davis Conservancy District (1958) 238 Ind. 502, 514, 153 N. E. (2d) 125, 131.

The title to this Act states that the purpose of the Act is "to impose an additional excise tax on transactions of retail merchants." Every such retail transaction obviously involves a purchaser as well as a merchant or seller. Therefore, the title is sufficient to inform both retail merchants and retail purchasers of the imposition upon them of an excise tax.

It is further urged that there were irregularities in the adoption of the Act in the legislature. This question is presented by an assignment of cross-errors on the ground that the trial court erred in excluding evidence as to the procedure followed in the enactment of the bill by the legislature. Appellees contend that the Senate Journal

shows that the bill did not receive "a majority of all members elected to" the Senate, as provided in Article 4, Section 25 of the Constitution of Indiana. It is asserted that after the bill was amended at a conference of both houses, it was returned to the Senate and upon a vote of 25 ayes and 24 noes, the conference report was approved and the bill was then signed by the presiding officers of the respective houses as passed, as provided in Article 4, Section 25 of the state Constitution.

The appellees cite *Skinner and Others v. Deming and Others* (1851), 2 Ind. 558, wherein the court did hold that the journal entry prevailed over the certification of the presiding officials. However, since *Evans, Auditor of State v. Browne* (1869), 30 Ind. 514, this court has consistently held that the proper authentication of an enrolled act is proof of its proper enactment, with the exception that fraud practiced upon the legislature or its presiding officers would vitiate the certification. The last case in this state where this court allowed an act of the legislature to be challenged for fraud was *State ex rel., Mayr, Jr., Secretary of State v. Marion Circuit Court* (1931), 202 Ind. 501, 176 N. E. 626. In that case the Marion Circuit Court was permitted to entertain the question of whether an act of the legislature passed at the 1931 session was void because of fraud. It was challenged that the Speaker of the House and the President of the Senate were defrauded into signing a bill which had never been passed by both houses of the General Assembly. No fraud of that character is charged in this case.

> *State ex rel. Cline v. Schricker* (1949), 228 Ind. 41, 88 N. E. (2d) 746.

As recently as 1956 this court said:

> "Once an enrolled act is authenticated by the pre-

siding officer of the Indiana General Assembly, signed by the Governor and filed in the office of the Secretary of State under the law of this state, the validity of its enactment may be questioned only for fraud."

Mogilner v. Metropolitan Plan Comm., etc. et al. (1957), 236 Ind. 298, 321, 140 N. E. (2d) 220, 231.

Although not raised in the complaint in the lower court, it is now asserted on appeal that double taxation makes the questioned Act unconstitutional. It is urged that some taxpayers may be paying a tax upon gross income and also paying a sales tax, cigarette tax or motor vehicle tax. We find nothing in the Constitution that limits the number of taxes that the legislature is in its judgment, may see fit to enact.

Wright v. Steers, Atty. General, et al. (1962), 242 Ind. 582, 179 N. E. (2d) 721.

We reiterate, the remedy as to the wisdom of such legislative action is at the polls at election time, rather than in the courts. The appellees cite no substantial authorities in support of their contentions on the point. As a result, we give it no further consideration.

The failure to reapportion the legislature, as provided in the Constitution, is presented as a ground for holding the act a nullity. This issue was not raised in the trial court and hence need not be considered on appeal. Were we to do so we would still be confronted with the recent case of *Fruit v. Metropolitan School District, etc.* (1961), 241 Ind. 621, 624, 172 N. E. (2d) 864, 866. In that case we said:

"Therefore, if plaintiff's prayer on this point were to be granted and the court should judicially declare

> the 1959 legislature to have been a de facto assembly, it would avail the plaintiffs nothing in this case. So far as Chapter 261 of the Acts of 1959 is concerned, the act is valid, whether the members of the General Assembly be de facto or de jure."

Nothing is presented which conceivably overcomes the opinion of this court as expressed above.

It is next urged that the exemptions in the Act are discriminatory under Article 1, Section 23, as well as vague and uncertain under Article 4, Section 20 of the Constitution of Indiana. Also, Article 4, Section 23 of the state Constitution provides that all laws must be general in their application and uniform in their operation. Appellees argue that Section 4(b)(1) of the Act exempts farmers as a special class. Section 4(b) provides that "* * * the state gross retail tax shall not apply to the following transactions:"

Paragraph (1) in question reads as follows:

> "(1) Sales to farmers and other persons occupationally engaged in the business of producing food and commodities for human, animal or poultry consumption either for sale or for further use in producing such food and commodities for sale, of animal and poultry life to be used by the purchaser for such production of food and commodities, feed for such animals and poultry, and seeds, plants, fertilizers, fungicides, insecticides and other tangible personal property to be used for such production of food and commodities."

Following this paragraph are enumerated a number of other exceptions, such as the sale of wrapping material, containers used in packaging for retail sales, newspapers, meals to school children, sales of certain manufacturing tools and equipment, sales to the State of Indiana and its

agencies and other governmental units, to mention but a few. Considering the language used, we feel the classification is proper since, at most, it is not limited merely to farmers, but also to "*other persons occupationally engaged in the business of producing goods and commodities for human, animal or poultry consumption.* * * *" The section, in our opinion, meets the requirements of Article 4, Section 23 of the Constitution as to its generality and also Article 1, Section 23, since it is applicable to all persons under the same considerations and in the same circumstances, namely those primarily engaged in the business of producing food for human and animal consumption.

Kelly v. Finney (1935), 207 Ind. 557, 194 N. E. (2d) 209;

Strange v. Board, etc. (1910), 173 Ind. 640, 91 N. E. 242.

Such classifications are found in the federal income statute as well as this state's gross income tax. Farming may be classified as a business for tax purposes.

Plant v. Walsh (1922), 280 F. 722;

Wilson v. Eisner (1922), 282 F. 38.

It is further pointed out that the provisions for exemptions and classifications are common to the retail sales acts found in the thirty-six states which have such methods of taxation.

> "All sales tax laws exempt or exclude some retail sales. The reasons for this treatment vary. Goods used in the manufacturing process are exempt entirely or partially by all state laws to avoid tax pyramiding, that is, the situation where a tax is levied on a tax and the result is a retail price increase greater

than the amount of the tax. The same rationale presumably has led to the exemption of such farm supplies as feed, seed, and fertilizer. Several states also exempt industrial machinery and fuel, and some states extend the exemption to farm machinery.

"To mitigate the regressivity of the sales tax, 'necessities' are frequently exempted, principally groceries, medicine, schoolbooks and clothing. * * *" Current Studies of Indiana Tax Policy, The Retail Sales Tax, Indiana Commission on State Tax and Financing Policy First Report—1962, page 11.

It is apparent that the exemption is for the purpose of treating as a wholesale sale the transactions specified and hence the transaction becomes taxable under the gross income tax rather than the retail sales tax. (See Section 3 of the Gross Income Tax Act.) The section is not discriminatory. It merely places a farmer and like persons engaged in the production of food for consumption in the category of certain manufacturers who are also exempted under the Act.

The legislature has latitude in determining classifications for taxation as long as it is based upon some reason connected with the subject matter.

Board, etc. v. Johnson (1909), 173 Ind. 76, 89 N. E. 590;

Crittenberger, Auditor v. State, etc., Trust Co. (1920 189 Ind. 411, 127 N. E. 552;

Miles v. Dept. of Treasury (1935), 209 Ind. 172, 199 N. E. 372.

Neither do we believe the section attacked is void for any vagueness as to the type of business transaction which is excepted from the application of the tax.

Hunt v. State (1924), 195 Ind. 585, 146 N. E. 329;

Ule v. State (1935), 208 Ind. 255, 194 N. E. 140.

Appellees argue and the trial court so found, that Section 3 of the Act gives the Department of Revenue the power to establish brackets for the collection of taxes, which is in violation of Article 4, Section 1 of the Indiana Constitution because of an improper delegation of legislative authority. Section 3, however, in our opinion is not controlling, since Sections 1 and 6 of the Act have a greater constitutional infirmity therein which makes the attempted delegation of authority in Section 3 void.

Section 1 of the Act provides as follows:

> "* * * Such tax shall be borne by the purchaser and shall be paid by the purchaser to the retail merchant, who shall collect the tax as agent for the state, at the rate fixed herein, any fractional cent of tax of 1/2 cent or more to be 1 cent of the tax, *unless modified* by the brackets of prices for tax collection established by the department pursuant to Section 38." (our emphasis)

Section 6 of the Act provides:

> "* * * Such tax shall be paid by the purchaser to the retail merchant who shall collect the tax as agent for the state, at the rate fixed herein, any fractional cent of tax of one-half cent or more to be one cent of tax, *unless modified by the brackets of prices for tax collection established by the department pursuant to Section 38.*" (our emphasis)

This particular clause in each section is definitely an unlawful delegation of power to the Department. Its purpose is to give the power to *modify* the express provisions

of the statute. To modify means to "change, to alter, to qualify."

Webster's Third International Dictionary.

Constitutionally, no one can modify or change the law except the legislature. It cannot delegate that power.

Article 4, Section 1, Constitution of Indiana.

We arrive at the conclusion that this part of the Act is unconstitutional by reason of Article 1, Sections 25 and 26 of the Constitution of Indiana.

Section 25 provides:

> "No law shall be passed, the taking effect of which shall be made to depend upon any authority, except as provided in this Constitution."

Section 26 provides the converse:

> "The operation of the laws shall never be suspended except by the authority of the General Assembly."

Furthermore, the purported authorization as provided in Section 38 of the Acts of 1933 as amended by Section 3 of this Act, is so indefinite that any action of the Department in connection therewith would be impossible of judicial review. This section as amended provides:

> "The department shall prepare *suitable brackets* of prices for the collection of both the state gross retail tax and the use tax in order to eliminate fractions of one cent and so that the aggregate collections of such taxes *by a retail merchant*, so far as may be practicable, shall be equal to two per cent (2%) of the gross *income subject to such taxes*." (our emphasis)

We cannot ignore the clear language of this provision which purports to authorize the Department to prepare "suitable

brackets of prices for the collection of * * * the * * * tax so that the * * * collections of such taxes by *a* retail merchant, so far as may be practicable, shall be equal to two per cent (2%) of the gross income subject to such taxes." Significantly, the term "a retail merchant" is used in the singular and not in the plural. Thus, this provision clearly authorizes the Department to separately and severally consider and determine what constitutes "suitable brackets" for each retail merchant, so that "so far as may be practicable," his tax shall equal two per cent (2%) of his income subject to such taxes. So vast and indefinite an obligation thrust upon the Department would obviously make its decisions as authorized and contemplated by the Act incapable of administration or judicial review.

In view of these constitutional provisions, we must hold that those portions of Sections 1 and 6 reading: "unless modified by the brackets of prices for tax collection established by the Department pursuant to Section 38," are unconstitutional.

Section 3 attempts to give the Department and the power to fix "suitable brackets of prices for the collection" of the taxes. This section must be read with Sections 1 and 6, which attempt to give the Department the authority to "modify" the rate brackets which are fixed by the law. Section 3 is a dependent upon the right to modify these brackets under Sections 1 and 6, and hence must fall with those portions of those sections of the Act. Where the law has definitely fixed the rate and brackets, the Department cannot establish other brackets or modify the same because of the constitutional provisions set forth above, which grants such authority only to the legislature.

We further hold that Section 3 and those parts of Sections 1 and 6 are clearly severable and their invalidity does not affect the remainder of the Act. The intention of the legislature in this respect is clearly reflected in Burns' 64-2631. The present Act is amendatory to the 1933 Act. This severability clause is broad enough to leave the remainder of the Act complete in itself and capable of being fully executed.

Ettinger v. Studevent; *Hale v. Dice* (1942), 219 Ind. 406, 38 N. E. (2d) 1000.

Appellees further contend that there is an illegal delegation of authority of Section 5 (c) which permits issuance of exemption certificates, and that the section is not constitutional under Article 4, Section 20 of the state Constitution, which provides that every act shall be plainly worded. Section 5(c) of the Act reads as follows:

"(c) Every retail merchant, manufacturer or wholesaler so registered, and the State of Indiana, every county, township, city and town of this state and every subdivision, agency and instrumentality thereof, is authorized to issue Exemption Certificates, in form prescribed by the department, certifying to the fact that the purchase of the tangible personal property and services described in such certificate constitutes a transaction exempt from the state gross retail tax. The department may permit, upon such terms or conditions as it deems reasonable, the issuance of blanket Exemption Certificates certifying that all or a specified kind or category of purchases during a stated period of time shall constitute exempt transactions. No person receiving any such Exemption Certificate from a purchaser authorized to issue such certificate shall have any duty to collect or any liability for any state gross retail tax in respect to the furnishing of property and services covered by such certificate."

The trial court particularly singled out the provision allowing the Department to issue blanket exemption certificates as being repugnant to our form of government.

The Act imposes the gross retail tax upon the purchaser. The seller or retail merchant acts only as an agent of the state in collecting it. Section 4 provides for certain exempt transactions. Section 5(c) provides the seller with a device whereby he can be assured of not being held liable for failure to collect the tax on those exempt transactions. It does not state, nor can it be found anywhere in the Act, that the Department has the authority to create an exemption by permitting the issuance of exemption certificates. This includes blanket exemption certificates. Section 4 is the exclusive source for determination of transactions which are exempt. It seems reasonable to assume from the section herein involved that the Department is authorized to prescribe forms of certificates by which a purchaser may certify that the purchase described therein falls within one or more of the exempt transactions set forth in Section 4. Therefore, Section 5 (c) provides an administrative means of convenience to protect a seller who might otherwise be placed in a position where he could be subjected to penal action for failure to collect and remit the tax on an exempt transaction. Blanket exemption certificates fall in this category and only pertain to a purchaser who buys the same type of goods in an exempt transaction over a period of time and avoids the necessity of having to issue a new certificate for each purchase.

It is to be noted that the Internal Revenue Code provides for exemption certificates before an exemption can be claimed from the tax imposed on sales or transfers of capital stock.

Internal Revenue Code 1954, Section 4345.

Another such provision for exemption certificates was contained in the Indiana Motor Vehicle Fuel Tax Act prior to 1955.

Burns' §47-1538.

While this Section of the Act is clumsily worded and is certainly confusing, the intent of the legislature may be seen as "through a glass darkly." However, the fact that the Act is not crystal-clear does not make it unconstitutional. As stated in *State ex rel. Spencer, Pros. Att'y. v. Baker, Judge* (1936), 212 Ind. 44, 52, 7 N. E. (2d) 984, 988:

> "* * * A statute should not be held void for uncertainty, if any reasonable and practical construction can be given it. *Mere difficulty in ascertaining its meaning does not render it void. It is the duty of the courts to endeavor by every rule of construction, if possible, to give full force and effect to every enactment of the General Assembly not obnoxious to constitutional prohibitions.*" (Emphasis ours)

In *Mogilner v. Metropolitan Plan Comm. et al.* (1956), 236 Ind. 298, 322, 323, 140 N. E. (2d) 220, 232, it was held that the "plain wording" provision in the Constitution does not require that each act be a model of rhetorical clarity, but merely susceptible to reasonable and intelligible construction:

> "Particular 11. Appellant asserts that the Act violates the provisions of Article 4, §20 of the Constitution of Indiana. * * *
>
> "We will, therefore, proceed to a consideration of said sections of the Act on the basis of this contention. Admittedly, the Act is far from a model of rhetorical clarity. However, if it is susceptible to reasonable and intelligible construction, it is the duty

of the court to so construe it. The rule which this court has adopted regarding the construction of this constitutional provision has been stated as follows: "* * * If a statute is susceptible of a reasonable construction which makes it intelligible and does not conflict with the Constitution, it will be given that construction and upheld, rather than a construction which would make it invalid. * * *" *Shideler, Auditor v. Martin* (1922), 192 Ind. 574, 578, 136 N. E. 1, 2."

In the recent case of *Orbison v. Welsh, Governor, et al.* (1961), 242 Ind. 385, 422, 423, 179 N. E. (2d) 727, it was contended that the Port Commission Act was unconstitutional because it was "unartfully drawn, cumbersome and unintelligible," in violation of Article 4, Section 10 of the state Constitution. We held "the Act is drafted in a manner that imports a reasonable degree of clarity and understanding. The intention of the Legislature is readily discernable and technical terms in general have been avoided. The purpose and content of the Act can be understood by persons reading the Act."

Being susceptible to both an intelligible and reasonable construction, this Act does not violate Article 4, Section 20 of the Indiana Constitution.

Furthermore the fact that this provision of the Act may result in some illegal trafficking in exemption certificates and in perplexities of administration does not make the section unconstitutional as providing for an unauthorized delegation of authority in the Department. We find no unlawful delegation of authority here.

The next question raised is whether the Act violates Article 1, Section 21 of the Indiana Constitution, which provides in part: "No man's particular services shall be demanded, without just compensation. * * *" Section 1 of the Act reads as follows in part:

> "* * * Such tax shall be borne by the purchaser and shall be paid by the purchaser to the retail merchant, who shall collect the tax as agent for the state, at the rate fixed herein, * * *."

See also like language in Section 6.

In the first place, we note that there is no party to this action who has or claims to have his constitutional right denied for this reason. In the complaint, plaintiff Committee on Political Education is alleging to be an unincorporated association, with one of its stated purposes being to secure for its members and all citizens a fair system of taxation. Plaintiff Dallas Sells alleges that he is a citizen and taxpayer of Indiana and of the United States of America, bringing the action on behalf of himself and all others whose situation is the same as his own. There is no allegation that either of them are retail merchants or are engaged in any retail business which would make them agents for the state.

In the second place, the issue was not raised by the pleadings nor put into issue at the trial of the cause. The trial judge stated his finding of unconstitutionality on that ground was "merely dicta." Although we are not bound to consider this question, in order to eliminate the uncertainty as to the constitutionality of this Act on that issue and because of the public interest, we have given it special scrutiny.

Appellants argue that the cases of *Gafill v. Brecken, Auditor* (1925), 195 Ind. 551, 145 N. E. 312, 146 N. E. 109, and *Akers et al. v. Handley et al.* (1958), 238 Ind. 288, 149 N. E. (2d) 692, are controlling.

Appellees attempt to distinguish these cases. However, we do not need to determine whether these cases govern the

instant cause. There is no evidence in the record from which this court might determine that under the bracket system provided by the Act, the amount of tax collected by the retailer might not exceed his liability for payment of such taxes. We point out that the law fixes any fractional cent of tax of one-half cent or more to be one cent of tax; thus any sale of items selling for twenty-five cents would bring a tax of one cent or a rate of 4%, yet the retailer only pays a tax of 2% on the gross sales of such items. Within the framework of the law itself there is an opportunity for the retailer to recover monies in the nature of compensation for the service required of him. Although the Act does not expressly provide for such to be compensation, we cannot take judicial knowledge of the fact, if it be a fact, that no such compensation will result from the operation of the Act as provided. In the absence of any evidence in support of such fact, there is no factual basis upon which this court could rule adversely to the Act.

It is contended that the tax imposed on the gross income of retailers selling items for twenty-four cents or less, where they collect no tax, requiring them to pay 2% on the gross income from such sales, is in violation of the Fourteenth Amendment to the United States Constitution and also Article 1, Section 21 of the Indiana Constitution which provides in part: "* * * No man's property shall be taken * * * without just compensation * * *," and Section 23 (privileges and immunities clause).

Section 14 of the Act here in question, provides in part:

> "Notwithstanding the amount of state gross retail tax or use tax collected from purchasers, the retail merchant shall be liable for and shall remit, as the case may be 2% of the gross income of the retail merchant from *taxable transactions* to be included in his

return for the reporting period * * *." (our emphasis).

The Act continues to provide: "**Every retail merchant** shall be personally liable for such taxes, which shall constitute a trust fund in the hands of the retail merchant and shall be owned by the State * * *."

In view of the above provisions of the Act, the decisive question remains as to what are "taxable transactions" which must be included in the returns filed by the retail merchants. In this regard, Section 16 also provides in part that every taxpayer "* * * shall file returns reporting *taxable transactions* * * *" (our emphasis) at stated periods. Thus, a reasonable construction of the Act is that the retail merchant is not required to report or pay taxes on *non-taxable transactions*. Such sales being not subject to the tax, the income received therefrom would not be included in the gross taxable transaction subject to the rate of 2%. Thus, by such construction we avoid the unconstitutionality urged that certain retail merchants would be subject to the payment of money as a tax for retail sales in cases in which the transaction was one in which they received no tax money because it involved a sales price at which the fractional tax would be less than 1/2 cent.

As we previously have stated, in arriving at a determination of the issues involved, in the case at bar we have been guided by the fundamental requirements that where the constitutionality of a statute is in question, we are compelled to resolve all doubts, implications and inferences in favor of the statute.

It is conceded that the legislature may pass unpopular, unwise, or inequitable laws in the exercise of its function as one of the three co-ordinate branches of our gov-

ernment. This court in a proper case will review the questioned legislation only to determine whether or not the statute meets the minimal constitutional requirements.

In a case properly before us, particularly where the statute carries a saving clause and is capable of serability, a determination that certain portions of the act are unconstitutional will not destroy the effect of the entire act if the remaining portions thereof are complete, sensible and capable of being fully executed in a manner consistent with the purpose of the law.

In reaching a decision that the Act in question is constitutional (with the exceptions designated), this court is confronted with the fact that the purchasing public and retail merchants should be protected against liability, both criminal and civil, by reason of their failure to pay and collect taxes on transactions occurring during the period of the trial court's injunction. Undue hardships and injustices, without question, would occur were we to follow the principle of law that the reversal or overruling of an adjudication of unconstitutionality validates the statute from the date of its enactment.

16 C.J.S., Constitutional Law, §101, p. 469.

Necessities have imposed exceptions to the general rule of retroactivity. We said in *Martin v. Ben Davis Conservancy Dist.* (1958), 238 Ind. 502, 510, 153 N. E. (2d) 125, 129:

> "The theory that a law held unconstitutional is no law at all and void ab initio for all purposes including retroactive invalidity runs counter to the hard facts of life. The actual existence of a statute prior to a determination of invalidity is an operative fact. Because of such de facto existence and reliance upon its va

> lidity, it has practical consequences which cannot be justly ignored. The past cannot always be erased by a simple judicial decree. * * *"

No court is so absolute that it can, by simply so decreeing, erase the past effects of and compliance with the trial court's injunction preventing the operation of the act in question during the period of this litigation. In justice to all parties involved, our decision must have only a prospective effect from the date of its certification. Both purchaser and retailers would otherwise be subject to fines and penalties, including imprisonment, by reason of failure to comply with the act. A similar situation has confronted courts of sister states. The courts there have held that the tax act should only be effectuated prospectively "when the judgment of this court as here announced becomes final."

Wiseman v. Phillips (1935), 191 Ark. 63, 34 S. W. (2d) 91;

State v. Whitman (1934), 116 Fla. 196, 156 So. 705;

Arizona State Tax Commission v. Ensign (1953), 74 Ariz. 376, 257 P. (2d) 392;

Oklahoma County v. Queen City Lodge, No. 197 (1945), 195 Okla. 131, 156 P. (2d) 340;

Commonwealth v. Whitelaw (1946), 302 Ky. 526, 195 S. W. (2d) 71.

Under Rule 2-31 of this court, the Clerk is directed to certify this opinion forthwith upon the expiration of twenty (20) days following the date of this opinion, unless prior to said certification date a petition for rehearing is filed, and in that event, to certify the opinion forthwith

upon the date of the determination of the case pursuant to petition, if the same is denied.

Notwithstanding the fact that the trial court's injunction will not be formally dissolved until final certification of this opinion, a stay of the injunction granted by the lower court is now issued, effective at this time to the extent of permitting the Indiana Department of State Revenue to proceed to establish administrative and operating procedures for the imposition and collection of the tax as herein questioned, including the processing of applications for registered retail merchant certificates, the issuance of information bulletins or instructions, the preparation of forms, and other administrative steps incident to the orderly reimposition of the taxes.

The judgment of the trial court is reversed, with directions to render judgment for appellants and dissolve the injunction heretofore issued.

APPENDIX B

IN THE
SUPREME COURT OF INDIANA

APPEAL FROM THE MARION CIRCUIT COURT

MATTHEW WELSH, As Governor of the State of Indiana and As A Member of the Indiana Revenue Board, and
JAMES C. COURTNEY, As Revenue Commissioner of the State of Indiana,
Appellants,

v.

DALLAS SELLS,
COMMITTEE ON POLITICAL EDUCATION,
EDWIN K. STEERS, JR., As Attorney General of the State of Indiana,
ROBERT HUGHES, Treasurer of the State of Indiana, and
DOROTHY GARDNER, Auditor of the State of Indiana, As Members of the Indiana Revenue Board,
INDIANA DEPARTMENT OF STATE REVENUE,
Appellees.

No. 30442

OPINION ON REHEARING

PER CURIAM

The petition for rehearing filed by Edwin K. Steers, Jr., as Attorney General of the State of Indiana, asserts that, in part,

"Said decision and opinion is violative of the Indiana Constitution, Art. 4, Sec. 25, when the opinion admits:

a

> " * * that the Senate Journal shows that the bill did not receive "a majority of all members elected to" the Senate, as provided in Article 4, Section 25 of the Constitution of Indiana,'" and * * * "'This record reveals that after the bill was amended radically at a conference of both houses, it was returned to the Senate and upon a vote of 25 ayes and 24 noes, the conference report was approved and the bill was then signed by the presiding officers of the respective houses as passed, as provided in Article 4, Section 25 of the state Constitution.'"

The court, on rehearing, on reviewing the record finds that the record in fact does *not* contain the Senate Journal, and the previous opinion has therefore been amended on rehearing to delete the statement as to what the Senate Journal disclosed in this case and to substitute therefor a statement as to the contentions of appellees, as to the contents of the Senate Journal.

Although not mentioned in the petitions for rehearing, we have also corrected a minor clerical error by substituting the words twenty-four cents for twenty-five cents appearing in the opinion.

Subject to the foregoing comments, we now on rehearing adhere to the conclusions reached in our previous opinion

APPENDIX C

IN THE

SUPREME COURT OF INDIANA

MATTHEW WELSH, As Governor of the State of Indiana and As A Member of the Indiana Revenue Board, and JAMES C. COURTNEY, As Revenue Commissioner of the State of Indiana,
Appellants,

v.

DALLAS SELLS, COMMITTEE ON POLITICAL EDUCATION, EDWIN K. STEERS, JR., As Attorney General of the State of Indiana, ROBERT HUGHES, Treasurer of the State of Indiana, and DOROTHY GARDNER, Auditor of the State of Indiana, As Members of the Indiana Revenue Board, INDIANA DEPARTMENT OF STATE REVENUE,
Appellees.

No. 30442

OPINION ON MOTION FOR LEAVE TO FILE AMENDED PETITION FOR REHEARING AND FOR STAY

PER CURIAM

Appellees, Dallas Sells, et al. filed "A Motion for Leave to File an Amended Petition for Rehearing and For Stay of

Execution of Judgment." The appellees have raised some question as to the authority or propriety of this court in making corrections in the original opinion on consideration of a petition for rehearing in this case. We denied the petition for hearing, with a short opinion, noting the corrections that had been made. We said:

> "The court, on rehearing, on reviewing the record finds that the record in fact does *not* contain the Senate Journal, and the previous opinion has therefore been amended on rehearing to delete the statement as to what the Senate Journal disclosed in this case and to substitute therefor a statement as to the contentions of appellees, as to the contents of the Senate Journal.
>
> "Although not mentioned in the petitions for rehearing, we have also corrected a minor clerical error by substituting the words twenty-four cents for twenty-five cents appearing in the opinion.
>
> "Subject to the foregoing comments, we now on rehearing adhere to the conclusions reached in our previous opinion."

No one can seriously question our right or duty to make corrections in an opinion to conform to the record when they are brought to the attention of the court in a petition for rehearing. Of course, the very purpose of a petition for rehearing is to enable the court to make any modifications or corrections that it finds advisable. Such changes in the original opinion have in the past been made either by changing the original opinion directly or by reference in the opinion on rehearing.[1]

We point out that whether the corrections in the original draft of the opinion had been made or not, the appellees

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1 2 I.L.E., Sec. 672; Indiana Trial and Appellate Practice, Sec. 2826.

were not prejudiced or misled. Even if we assumed, either through judicial notice or that the record in the trial court below showed the vote in the Senate Journal to be 25 ayes and 24 noes for the bill in question, we would still be compelled to deny the appellees' contention that we should go behind the certificate of the presiding officers of the legislature authenticating the passage of the bill. To have accepted appellees' contention would have required that we overrule the precedent of a long-standing line of cases to the contrary going back nearly a century in this state beginning with the case of *Evans, Auditor of State v. Browne* (1869), 30 Ind. 514. The reasoning connected with this precedent is made clear in the original opinion in this case and should be no surprise to any of the parties upon a petition for rehearing.

This court would have been confronted also with a further constitutional provision which says:

> "* * * whenever the Senate shall be equally divided he (the Lieutenant Governor) shall give the casting vote."
>
> Art. 5, Sec. 21, Constitution of Indiana.

If the Senate were equally divided in the passage of a bill, it is obvious that a bill could not receive a vote of "a majority of the members elected to each house" as provided in another part (Art. 4, Sec. 25) of the Constitution of this State, since the Lieutenant Governor, in breaking the tie in voting, is not "an elected member" of the Senate. There could never be, in the case where the Lieutenant Governor voted in a tie, "a majority of the members elected" voting in favor of the bill, as provided in Art. 4, Sec. 25. Article 5, Sec. 21, apparently conflicts to some extent with Article 4, Sec. 25 when tie voting is involved in the Senate. The Constitution has to be read as a whole and not

as a part. The solution to this question is not as simple as some people, untrained in the law and unfamiliar with the Indiana Constitution, may think. We, however, do not and need not decide this question in view of the consistent, long-standing precedent in the cases beginning with *Evans v. Brown, supra*, which have held that this court will not go behind a properly authenticated certificate of the presiding officers of the two houses of the legislature that a bill has been duly enacted, except in the case of fraud as previously stated in our opinion.

We have given due consideration to appellees' motion for leave to file an amended petition for rehearing. We find that the appellees have not been prejudiced as they claim, since we did not say in the opinion that we took "judicial notice" of the vote recorded in the Senate Journal. We have merely corrected a statement in the opinion concerning the record with reference to the Senate Journal. Judge Niblack in the trial court, following the above mentioned long-standing precedent on this issue, excluded all such evidence and there was nothing before us other than what the "appellees contend" with reference to such matter.

Motion overruled.

APPENDIX D

HOUSE ENROLLED ACT No. 1226

AN ACT to amend an act entitled "An Act to provide for the raising of public revenue by imposing a tax upon the receipt of gross income, to provide for the ascertainment, assessment and collection of said tax, and to provide penalties for the violation of the terms of this act and declaring an emergency," being Chapter 50 of the Acts of 1933, as last amended by Chapter 293 of the Acts of 1961, to impose an additional excise tax on transactions of retail merchants constituting selling at retail and an additional excise tax on the use, storage or other consumption of tangible personal property in this state, redefining certain transactions constituting selling at retail for the imposition of such additional taxes, repealing the store license tax, amending the title thereto, increasing certain gross income tax rates, revising certain exemptions, providing an individual credit and declaring an emergency.

Be it enacted by the General Assembly of the State of Indiana:

SECTION 1. Acts 1933, c. 50, is amended by adding a new and additional section thereto to be numbered Sec. 36 and to read as follows: Sec. 36. In addition to the gross income tax imposed by this act, an additional excise tax, to be known as the state gross retail tax, is hereby imposed on transactions of retail merchants constituting selling at retail, as defined in Sec. 37 of this act, occurring on or after July 1, 1963, subject to the exceptions and exemptions provided in Sec. 39 of this act, at the rate of two per cent (2%) on the gross income derived therefrom. Such tax shall be borne by the purchaser and shall be paid by the purchaser to the retail merchant, who shall collect the tax as agent for the state, at the rate fixed herein, any fractional cent of tax of one-half cent or more to be one cent

of tax, unless modified by the brackets of prices for tax collection established by the department pursuant to Sec. 38.

SEC. 2. Acts 1933, c. 50, is amended by adding a new and additional section thereto to be numbered Sec. 37 and to read as follows: Sec. 37. For the purpose of the state gross retail tax and use tax:

(a) Transactions of retail merchants constituting selling at retail shall include all transactions defined as "selling at retail" in subsection (k) of Section 1 of this act, and all transactions constituting selling at retail under the provisions of this Sec. 37.

(b) Every person engaged in the business of renting or furnishing for periods of less than thirty (30) days any room or rooms, lodgings or accommodations, in any hotel, motel, inn, tourist camp, tourist cabin or any other place in which rooms, lodgings or accommodations are regularly furnished for a consideration, shall be and constitute a retail merchant in respect thereto and the gross income received therefrom shall constitute gross income of a retail merchant received from transactions constituting selling at retail.

(c) Every person engaged as a public utility in furnishing or selling electrical energy, natural or artificial gas or mixtures thereof, water, or steam or steam heating service to consumers for domestic or commercial consumption shall be and constitute a retail merchant in respect thereto, and the gross income received therefrom, except that part thereof received from sales to consumers for use in manufacturing, mining, production, construction, refining, oil or mineral extraction and irrigation or to other public utility companies described in subsections (c), (d) and (e) of this section and except receipts from the provision, installation, construction, servicing or removal of tangible personal

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property used in connection with the furnishing of any such public utility service or commodity, shall constitute gross income of a retail merchant received from selling at retail. Provided that the furnishing of any such utility service or commodity for such excepted commercial or industrial uses not separately metered for such uses shall in its entirety constitute selling at retail unless such service or commodity is predominantly used for one or more of said excepted uses, in which event it shall be deemed to be wholly used for such excepted uses.

(d) Every person engaged as a public utility in the furnishing of communication service, with respect to the furnishing of local exchange telephone service or intrastate message toll telephone service shall be and constitute a retail merchant in respect thereto, and the gross income received therefrom upon billings or statements rendered to consumers, except that part thereof received from other public utilities described in subsections (c), (d) or (e) of this section and except receipts from the provision, installation, construction, servicing or removal of tangible personal property used in connection with the furnishing of such service, shall constitute gross income received from selling at retail.

(e) Every person engaged as a public utility in the furnishing of telegraph service, with respect to the furnishing of intrastate telegraph service shall be and constitute a retail merchant in respect thereto, and the gross income received therefrom, except that part received from other public utilities described in subsections (c), (d) or (e) of this section and except receipts from the provision, installation, construction, servicing or removal of tangible personal property used in connection with the furnishing of such service, shall constitute gross income from selling at retail.

(f) The gross income of public utilities received as retail merchants from selling at retail, as in this section defined, shall be subject to said taxes whether the charge therefor is a minimum charge, flat charge, service charge or membership fee, or is in any other manner described or billed.

(g) The State of Indiana, its agencies and instrumentalities, all counties, townships and municipal corporations, their respective agencies and instrumentalities, and all other state governmental entities and subdivisions, including state colleges and universities, shall, in the performance of private or proprietary activities or business constitute retail merchants in respect to receipts which would constitute gross income from selling at retail if received by a retail merchant.

(h) With respect to all transactions except the furnishing of public utility services and commodities by public utilities described in the foregoing subsections (c), (d) and (e), a transaction shall be deemed to have occurred on or after July 1, 1963, to the extent that delivery of the property or services constituting selling at retail is made on or after that date to the purchaser or to the place of delivery designated by the purchaser, except that a transaction shall be deemed to have occurred prior to that date to the extent that the agreement of the parties to the transaction was entered into prior to March 1, 1963, and payment for the property or services furnished in the transaction is made prior to July 1, 1963, notwithstanding the delivery of the property or services on or after that date. With respect to transactions constituting the furnishing of public utility services and commodities subject to said taxes, only such transactions for which the charges are collected upon original statements and billings dated on or after August 1,

1963, shall be deemed to have occurred on or after July 1, 1963, and shall be subject to said taxes.

(i) Such taxes shall apply and be computed in respect to each unitary transaction. A unitary transaction shall include all items of property or services furnished pursuant to a single order or agreement and for which a total combined charge or selling price is computed for payment. All public utility services and commodities subject to said taxes invoiced in a single billing or statement submitted to a consumer for payment shall constitute a unitary transaction.

(j) The existence of a "fixed and established place of business" specified in subsection (j) of Section 1 shall not be a requisite to constitute a person as a retail merchant.

SEC. 3. Acts of 1933, Chapter 50, is amended by adding a new and additional section thereto to be numbered Section 38 and to read as follows: Sec. 38. The department shall prepare suitable brackets of prices for the collection of both the state gross retail tax and the use tax in order to eliminate factions of one cent and so that the aggregate collections of such taxes by a retail merchant, so far as may be practicable, shall be equal to two per cent (2%) of the gross income subject to such taxes.

SEC. 4. Acts of 1933, Chapter 50, as amended by adding a new and additional section thereto to be numbered Section 39 and to read as follows: Sec. 39. (a) The state gross retail tax shall not apply to such part of the gross income from transactions constituting selling at retail as is exempt from the gross income tax under the provisions of subsections (a), (b), (c), (m) and (o) of Section 6 of this act. No other exception or exemption provided in Section 6 shall apply to the state gross retail tax.

(b) Nor shall the state gross retail tax apply to any of the following transactions:

(1) Sales to farmers and other persons occupationally engaged in the business of producing food and commodities for human, animal or poultry consumption either for sale or for further use in producing such food and commodities for sale, of animal and poultry life to be used by the purchaser for such production of food and commodities, feed for such animals and poultry, and seeds, plants, fertilizers, fungicides, insecticides and other tangible personal property to be used for such production of food and commodities.

(2) Sales of nonreturnable wrapping materials and empty containers to be used by the purchaser as enclosures or containers for selling contents to be added, and returnable containers containing contents sold in a sale constituting selling at retail, and returnable containers sold empty for refilling. As used in this clause, returnable containers means containers customarily returned by the buyer of the contents for reuse as containers; all other containers are nonreturnable containers.

(3) Sales of newspapers.

(4) From the sale and from the storage, use or other consumption in this state of tangible personal property or service which is directly used or consumed in the rendering of public transportation of persons or property.

(5) Sales to the State of Indiana, its agencies and instrumentalities, all counties, townships and municipal corporations, their respective agencies and instrumentalities, and all other state governmental entities and subdivisions of tangible personal property and public utility services

and commodities predominantly for use in the performance of governmental functions.

(6) Sales of manufacturing machinery, tools and equipment to be directly used by the purchaser in the direct production, manufacture, fabrication, assembly, extraction, mining, processing, refining or finishing of tangible personal property; sales of all tangible personal property to those public utilities described in subsections (c), (d) and (e) of Sec. 37; sales of agricultural machinery, tools and equipment to be directly used by the purchaser in the direct production, extraction, harvesting or processing of agricultural commodities; and sales of tangible personal property to be directly used by the purchaser in the direct production or manufacture of any such manufacturing or agricultural machinery, tools and equipment.

(7) The furnishing of school meals to school children and school employees on school premises in all schools of grades one through twelve.

(8) Sales and purchases by organizations wholly exempt from liability for the gross income tax under subsection (i) of Section 6 of this act of tangible personal property and services (including public utility services and commodities) used by such organizations predominantly for the purposes for which such organizations are granted exemption under such subsection (i).

SEC. 5. Acts of 1933, Chapter 50, is amended by adding a new and additional section thereto to be numbered Section 40 and to read as follows: Sec. 40. (a) Each retail merchant engaged in selling at retail in this state shall prior to June 15, 1963, or, if not on that date so engaged, prior to engaging in any transaction constituting selling at retail in this state, file with the department, on a form provided by the department, an application for registration as a retail merchant, with respect to each store or place of

business at which such retail merchant engages in selling at retail in this state. Upon the filing of such application and the payment of a registration fee of $3.50 for each store or place of business, and subject to such requirements for security for the payment of tax as the department may prescribe pursuant to the provisions of this act, the retail merchant shall receive from the department a Registered Retail Merchant Certificate for each such store or place of business bearing a serial number and designating the location of such store or place of business. Any such retail merchant, wherever residing, not maintaining a store or place of business in this state shall in like manner and for the same registration fee and subject to the same security requirements procure a Registered Retail Merchant Certificate showing his place of residence as his place of business. The department may also permit manufacturers and wholesalers in like manner and for the same registration fee to register with the department as purchasers of property in exempt transactions and may issue to such manufacturers and wholesalers a Manufacturer or Wholesaler Certificate, bearing a serial number and designating the location of the principal place of business of the manufacturer or wholesaler. Any such Registered Retail Merchant or Manufacturer or Wholesaler Certificate may for due cause be revoked by the department at any time upon five days' notice to the holder of such Certificate. Provided, however, that a public utility shall be required to procure only one Registered Retail Merchant Certificate in respect to the furnishing of public utility service or commodities, taxable as transactions constituting selling at retail under this act, showing its principal office in Indiana as its place of business, such Certificate to be in addition to any such certificate required to be procured by a public utility because it otherwise engages as a retail merchant in selling at retail.

(b) Each such Retail Merchant and Manufacturer or Wholesaler Certificate shall be in effect for the purposes of this act for the calendar year in which it is issued and for each subsequent calendar year for which it is renewed by the filing of a renewal application on a form provided by the department and the payment of an annual renewal fee of $3.50. Such renewal application shall be filed not later than December 15 of the year preceding the year for which it is to be renewed, and the department shall forthwith issue a certificate evidencing such renewal, subject to such security requirements as the department may prescribe pursuant to this act.

(c) Every retail merchant, manufacturer or wholesaler so registered, and the State of Indiana, every county, township, city and town of this state and every subdivision, agency and instrumentality thereof, is authorized to issue Exemption Certificates, in form prescribed by the department, certifying to the fact that the purchase of the tangible personal property and services described in such certificate constitutes a transaction exempt from the state gross retail tax. The department may permit, upon such terms or conditions as it deems reasonable, the issuance of blanket Exemption Certificates certifying that all or a specified kind or category of purchases during a stated period of time shall constitute exempt transactions. No person receiving any such Exemption Certificate from a purchaser authorized to issue such certificate shall have any duty to collect or any liability for any state gross retail tax in respect to the furnishing of property and services covered by such certificate.

(d) Any retail merchant who fails to obtain the Registered Retail Merchant Certificate or a renewal certificate thereof as required to be procured by subsection (c) of this

section shall be guilty of a misdemeanor and on conviction thereof shall be fined not less than one hundred dollars or more than one thousand dollars.

SEC. 6. Acts of 1933, Chapter 50, is amended by adding a new and additional section thereto to be numbered Section 41 and to read as follows: Sec. 41. Subject to the exceptions and exemptions provided in Section 43 of this act, an excise tax, to be known as the use tax, is hereby imposed on the storage, use or other consumption in this state of tangible personal property purchased in a transaction occurring on or after July 1, 1963, in this state or elsewhere at retail from a retail merchant, wherever located, for storage, use or other consumption in this state, at the rate of two per cent (2%) on the sale price paid for such property. Such tax shall be paid by the purchaser to the retail merchant, who shall collect the tax as agent for the state, at the rate fixed herein, any fractional cent of tax of one-half cent or more to be one cent of tax, unless modified by the brackets of prices for tax collection established by the department pursuant to Section 38.

SEC. 7. Acts of 1933, Chapter 50, is amended by adding a new and additional section thereto to be numbered Section 42 and to read as follows: Sec. 42. For the purpose only of the imposition of the use tax, unless the context otherwise requires:

(a) The term "purchased at retail" shall mean and include only the purchase of property from a retail merchant in a transaction constituting selling at retail, as defined in Section 37 of this act.

(b) The term "sale price" shall mean and include so much of the consideration paid for property purchased at retail from a retail merchant as would constitute gross income from selling at retail, as defined in this act, without

reduction for any exemption or exception other than those provided for in Section 43 of this act.

(c) The term "use" shall mean and include the exercise of any right or power over tangible personal property incident to the ownership of that property.

(d) The term "storage" shall mean and include any keeping or retention of tangible personal property in this state for any purpose except subsequent use solely outside this state.

SEC. 8. Acts of 1933, Chapter 50, is amended by adding a new and additional section thereto to be numbered Section 43 and to read as follows: Sec. 43. The use tax shall not apply to that part of the sale price of property excepted from gross income by subsections (b), (c), (m) and (o) of Section 6 of this act. The use tax shall not apply to the storage, use or other consumption in this state of tangible personal property sold in this state in a transaction subject to the state gross retail tax or acquired in a transaction exempt, or to the extent exempt, from the state gross retail tax under subsection (b) of Section 29.

SEC. 9. Acts of 1933, Chapter 50, is amended by adding a new and additional section thereto to be numbered Section 44 and to read as follows: Sec. 44. Every retail merchant engaged in business in this state shall collect the use tax from the purchaser and, if requested by the purchaser, shall give such purchaser a receipt therefor. For the purpose of the use tax, the term "retail merchant engaged in business in this state" shall include any of the following:

(a) Any retail merchant engaged in selling at retail for use, storage or consumption in this state and maintaining, occupying or using, permanently or temporarily, di-

rectly or indirectly, or through a subsidiary, or agent, an office, place of distribution, sales or sample room or place, warehouse or storage place or other place of business in this state.

(b) Any retail merchant engaged in selling at retail for use, storage or consumption in this state and having any representative, agent, salesman, canvasser or solicitor operating in this state under the authority of the retail merchant or its subsidiary for the purpose of selling, delivering, or the taking of orders for the sale of any tangible personal property for use, storage or consumption in this state.

SEC. 10. Acts of 1933, Chapter 50, is amended by adding a new and additional section thereto to be numbered Section 45 and to read as follows: Sec. 45. (a) Every person storing, using or otherwise consuming in this state tangible personal property subject to the use tax shall be personally liable for the use tax imposed on all such transactions in respect to which he shall not receive a receipt for the tax or other written evidence of collection of the tax from a retail merchant holding a Registered Retail Merchant Certificate issued under Section 40 or under Section 47 of this act.

(b) Every person liable for the payment of use tax imposed by this act on any tangible personal property shall be entitled to a credit for the amount of any sale, purchase or use tax paid to any other state, territory or possession of the United States of America with respect to the acquisition of such property.

(c) No motor vehicle purchased on or after July 1, 1963, shall be licensed for use on the highways of this state unless the registered owner thereof shall present to the licensing

agency at the time such motor vehicle is first licensed in his name proper evidence, as prescribed by the department, of the payment of the state gross retail tax or use tax owing in respect to his acquisition of ownership of such motor vehicle, or an affidavit of exemption from such tax liability in form prescribed by the department, or shall then pay to such agency upon forms and receipts prescribed by the department, the amount of any such tax owing and unpaid on the purchase of such motor vehicle.

SEC. 11. Acts of 1933, Chapter 50, is amended by adding a new and additional section thereto to be numbered Section 46 and to read as follows: Sec. 46. For the purpose of the proper administration of the use tax and to prevent evasion thereof, it shall be presumed that tangible personal property sold by any retail merchant for delivery in this state is purchased at retail for storage, use or other consumption in this state until the contrary is established. The burden of proving the contrary is upon the purchaser, and such burden shall also be upon the retail merchant who makes the sale unless he receives from the purchaser an Exemption Certificate as provided for in Section 47 of this act.

SEC. 12. Acts of 1933, Chapter 50, is amended by adding a new and additional section thereto to be numbered Section 47 and to read as follows: Sec. 47. (a) Every retail merchant engaged in business in this state selling property subject to the use tax and who is not required to register with the department as a retail merchant under Section 40 shall, prior to engaging in any transaction subject to the use tax, file with the department, on a form provided by the department, an application for registration as a retail merchant, which application shall set forth:

(1) The name and address of principal employees and agents and representatives of such retail merchant engaged in this state in the solicitation or negotiation of transactions constituting selling at retail.

(2) The location of all distribution or sales houses or offices or other places of business of such retail merchant in this state.

(3) Such other relevant information as the department may require.

Every retail merchant registered under either Section 40 or this section is authorized to issue Exemption Certificates, in form prescribed by the department, certifying to the fact that the purchase by such retail merchant of tangible personal property identified in such certificate is exempt from the use tax. For the purposes of the use tax, all of the provisions of Section 40 relative to the issuance and renewal of Registered Retail Merchant Certificates and Manufacturer or Wholesaler Certificates therein provided for, the fees payable for such issuance and renewal, the periods of time for which such Certificates are in effect, the authority of registered retail merchants, manufacturers and wholesalers, and governmental agencies to issue Exemption Certificates or blanket Exemption Certificates and the legal effect thereof upon liability for tax or collection of tax shall be applicable to persons registered under either said Section 40 or this Section 47.

(b) The department may, in its discretion, permit the collection of the use tax by any out-of-state retail merchant not required by this act to collect such tax, who, to the satisfaction of the department, furnishes adequate bond or security to insure collection and payment of the tax. Subject to all of the provisions of Section 41, such retail merchant may be issued a Registered Retail Merchant

Certificate which shall permit such retail merchant to collect such tax in such manner and subject to such conditions as the department shall prescribe. When so authorized, it shall be the duty of such retail merchant to collect the tax upon all tangible personal property sold to his knowledge for use, storage or other consumption within this state, in the same manner and subject to the same requirements as a retail merchant engaged in business within this state.

SEC. 13. Acts of 1933, Chapter 50, is amended by adding a new and additional section thereto to be numbered Section 48 and to read as follows: Sec. 48. If any person who issues an Exemption Certificate in respect to the state gross retail tax or the use tax and thereafter makes any use of the tangible personal property covered by such certificate for which exemption from either of said taxes is not permitted, such use shall thereupon become subject to the use tax and such person shall at such time become liable for the use tax due thereon.

SEC. 14. Acts of 1933, Chapter 50, is amended by adding a new and additional section thereto to be numbered Section 49 and to read as follows: Sec. 49. The state gross retail tax and the use tax shall be collected by the retail merchant, as agent for the State of Indiana, from the purchaser of property or services furnished in the transaction subject to said taxes as a separate added amount not part of the price or consideration. Notwithstanding the amount of state gross retail tax or use tax collected from purchasers, the retail merchant shall be liable for and shall remit, as the case may be, 2% of the gross income of the retail merchant from taxable transactions required to be included in his return for the reporting period, or 2% of the sale price from the sale of property subject to the use

tax required to be included in such return. Every retail merchant shall be personally liable for such taxes, which shall constitute a trust fund in the hands of the retail merchant and shall be owned by the state. Any retail merchant who shall intentionally fail to remit such taxes to the department as required by this act shall be guilty of the crime of theft as provided in Chapter 10 of of the Acts of 1963 Special Session and shall be punished in the same manner therein provided for the commission of such crime.

SEC. 15. Acts of 1933, Chapter 50, is amended by adding a new and additional section thereto to be numbered Section 50 and to read as follows: Sec. 50. The state gross retail tax and the use tax, whenever stated or displayed by the retail merchant, shall be stated and displayed by the retail merchant separately from the list price, the advertised price, the marked price, or any publicly stated price. It shall be unlawful for any retail merchant to advertise or to hold out or to state to the public or to any customer, either directly or indirectly, that any of such taxes will be assumed or absorbed by him or that such taxes will not be added to the selling price of the property or services furnished or that, if added, such taxes or any part will be refunded. Any person violating any provision of this section shall be guilty of a misdemeanor, and on conviction thereof shall be fined not less than one hundred dollars nor more than one thousand dollars.

SEC. 16. Acts of 1933, Chapter 50, is amended by adding a new and additional section thereto to be numbered Section 51 and to read as follows: Sec. 51. (a) Every person liable for or required to collect the state gross retail tax or the use tax shall file returns reporting taxable transactions and such taxes owing in respect thereto and shall make payment of such taxes to the department for such

periods and at such time and in such manner as is required by the provisions of this act in respect to the gross income tax; provided that every such person shall within thirty (30) days after the end of each of the first two (2) months of each quarterly reporting period deposit with the department the amount of tax, as nearly exact as may then be reasonably ascertained, for such month required to be remitted to the department. The department shall prescribe and provide all forms, reports, returns and other papers necessary for the proper reporting and payment of the state gross retail tax and the use tax and shall coordinate, combine and harmonize the reporting and payment of such taxes insofar as feasible with the requirements for the reporting and payment of the gross income tax. Any retail merchant already permitted by the department to report and make payment of the gross income tax or any tax imposed in lieu of the gross income tax on a fiscal year basis different from the calendar year, or on a basis of quarterly periods not corresponding to calendar month quarters or on an accrual basis shall have the right, without obtaining permission from the department, to report and make payment of the state gross retail tax and the use tax upon the same basis until the department directs otherwise. In any proper case, in the judgment of the department, where the retail merchant has failed to make proper collection or returns or payment of any such taxes, the department may require the retail merchant to make weekly or other periodic deposits of such taxes with the department and to file information returns or identification data in respect to such deposits.

(b) The state gross retail tax and the use tax shall not be subject to the exemptions allowed by Section 5 of this act. All other provisions of this act in respect to the gross income tax relative to the filing of returns, the auditing of

returns, investigation, determination, notification, assessment and collection of tax liability, examination of taxpayers' books and records, legal proceedings, court actions, remedies, privileges and relief available to the department and to the taxpayer, statutes of limitation, hearings, assessments, refunds, remittances, keeping and preservation of records by the department, confidential treatment of taxpayers' returns, duties of secretary of state and treasurer of state, the administration of the act, definitions, validity and separability of provisions, not in conflict or inconsistent with the specific provisions of this act in respect to the state gross retail tax and the use tax, shall be applicable to the imposition and collection of such taxes and the administration of such taxes by the department. Provided, however, that refund shall not be made to any retail merchant of any amount of such taxes collected by the retail merchant from a purchaser and not refunded or reimbursed by the retail merchant to such purchaser. And, provided, further, that any such purchaser shall have the right to apply for and receive refund of any amount of such taxes erroneously or illegally collected from or paid by him and remitted to the department and not refunded or reimbursed to him by the retail merchant, subject to all other requirements, limitations and restrictions applicable under the provisions of this act to the refunding of gross income tax to or the recovery of gross income tax by a taxpayer.

(c) Whenever it is deemed necessary to insure payment of the state gross retail tax or the use tax, the department may at any time, before or after the issuance or renewal of a Registered Retail Merchant Certificate under Section 40 or 47, require any retail merchant to deposit with it such security as the department may determine. The amount of the security shall be fixed by the depart-

ment, but shall not be greater than twice the average liability of such retail merchant for such taxes for each quarterly period. Such average quarterly liability shall be estimated and determined in such manner as the department deems proper. The amount of such security may be increased or decreased by the department subject to said limitation. The department may sell the security at public auction if it becomes necessary to so do in order to recover any tax, interest or penalty due. Security in the form of a bearer bond issued by the United States or any state or local governmental unit which has a prevailing market price may, however, be sold by the department at a private sale at a price not lower than the prevailing market price thereof. The department shall give notice of the date, time and place of the sale to the retail merchant who deposited the security by certified mail addressed to him at his last known address as it appears in the records of the department. Upon any sale any surplus above the amounts due shall be returned to the retail merchant who deposited the security.

SEC. 17. Acts of 1933, Chapter 50, is amended by adding a new and additional section thereto to be numbered Section 52 and to read as follows: Sec. 52. Upon application by any retail merchant, manufacturer or wholesaler registered with the department under either Section 40 or Section 47 of this act, the department, in its discretion, may issue to such applicant, subject to such terms and conditions as the department deems reasonable and necessary, a permit to be known as a Direct Payment Permit authorizing such permittee to make direct payment to the department of any state gross retail tax or use tax imposed on any purchase, use, storage or other consumption of tangible personal property or services by

such permittee. Such permittee may elect to pay any such taxes directly to the department and for that purpose may issue to the retail merchant selling or furnishing the tangible personal property or services subject to such taxes a "Direct Payment Certificate," in form prescribed by the department, assuming the payment of all such taxes, the receipt of which certificate shall discharge such retail merchant from any duty to collect or liability for such taxes. Such Direct Payment Permit may be revoked by the department, with or without cause, at any time.

SEC. 18. Acts of 1933, Chapter 50, is amended by adding a new and additional section thereto to be numbered Section 60 and to read as follows: Sec. 60. Notwithstanding any provisions of this act, the gross income received by the State of Indiana, its agencies and instrumentalities, all counties, townships and municipal corporations, their respective agencies and instrumentalities, and all other state governmental entities and subdivisions, including state colleges and universities, received on or after July 1, 1963, in the performance of private or proprietary activities or business shall be subject to the gross income tax.

SEC. 19. Acts of 1933, Chapter 50, is amended by adding a new and additional section thereto to be numbered Section 53 and to read as follows: Sec. 53. An Act entitled "An Act requiring licenses for operation, maintenance, opening or establishment of stores in this state, prescribing the license and filing fees to be paid therefor, and the disposition thereof, and the powers and duties of the state board of tax commissioners in connection therewith, and prescribing penalties for the violation thereof," approved March 19, 1929, being Chapter 207 of the Acts of 1929, and all acts amendatory thereof or supplemental thereto, imposing the store license tax, are

hereby specifically repealed. The requirement of the payment of the retail merchant registration fee provided for in Section 40 is intended to be inseparable from the repeal of said acts. In th event this Section 53 shall be held invalid or ineffective the registration fee provided for in Section 40 shall not be payable by any retail merchant in respect to any store or place of business for any calendar year for which the store license tax for such year has been paid. Further, such registration fee for the calendar year 1963 shall not be payable in respect to any store or place of business for which the store license tax for 1963 shall have been paid.

SEC. 20. Acts 1933, c. 50, as last amended by Acts 1961, c. 293, is further amended by adding thereto a new and additional section to be numbered Sec. 6D and to read as follows: Sec. 6D. Notwithstanding any other provision of this act, every individual who was a resident of this state for not less than six (6) months during a taxable year shall be entitled for such taxable year to a credit for Indiana retail gross income taxes paid on food and prescription drugs during such year equal to two per cent (2%) of Three Hundred Dollars ($300.00) or Six Dollars ($6.00). Such credit shall be claimed on the return required to be filed by the individual for gross income tax or any tax imposed in lieu of the gross income tax and shall be credited against the gross income tax or such other tax otherwise due. If the tax liability of any individual shown by the return is not equal to the total amount of the credit or credits which he is entitled to claim pursuant to this section, such individual shall be entitled to a refund in the amount of the excess of the credit or credits over the tax otherwise due. If any individual entitled to claim a credit or credits pursuant to this section

is not otherwise required bp this act to file a return for gross income or a tax imposed in lieu of the gross income tax, he may obtain a refund in the amount of such credit or credits by filing a return, completing such return insofar as may be applicable, and claiming such refund. In the case of any individual entitled to a credit pursuant to this section, who is not otherwise required by this act to file a return for gross income tax or any tax imposed in lieu of the gross income tax and who does not file an individual claim for refund pursuant to the immediately preceding sentence, credit may be claimed for such individual on the return of a parent, guardian, husband or wife of such individual by listing the name, address and relationship of such individual on such return and by certifying under the penalties of perjury that no credit for such individual pursuant to this section is otherwise being claimed for the year in question: any refund made as a result of such claim shall be made to the person filing the return. Where a credit for a legally competent adult is being claimed on the tax return of another pursuant to this section such adult shall also sign the required certificate under the penalties of perjury. Any refund to which an individual is entitled under the provisions of this section shall be made by the department in the same manner as other refunds under this act. No refund or credit shall be allowed pursuant to this section, unless such credit or refund is claimed on a tax return filed within six (6) months after the end of the taxable year for which such refund or credit is claimed. This section shall be applicable only to taxable years beginning on or after January 1, 1964.

SEC. 21. Acts 1933, c. 50, s. 3, as last amended by Acts 1957, c. 300, s. 1, is further amended to read as follows: Sec. 3. The tax upon the receipt of gross income

hereby provided for, shall be measured by the amount of volume of such gross income and shall be imposed at the following rates:

(a) With respect to that part of the gross income of every person which is received from wholesale sales, except as hereinafter provided in subsection (e) of this section, the tax shall be equal to one-half of one per cent (1/2%) of such part of the gross income. The term "wholesale sales" means and includes only the following: (1) Sales of any tangible personal property (except capital assets of the seller) to a purchaser who purchases the same for the purpose of reselling it in the form in which it is sold to him; (2) sales of any tangible personal property as a material which is to be directly consumed in direct production by the purchaser in the business or producing tangible personal property by manufacturing, processing, refining, repairing, mining, agriculture, or horticulture; (3) sales of any tangible personal property which is to be incorporated by the purchaser as a material or an integral part into tangible property produced by such purchaser in the business of manufacturing, assembling, constructing, refining, or processing; (4) receipts received from the business of industrial processing or servicing including but not limited to enameling and plating of any tangible personal property which is owned by and which is to be sold by the person for whom such processing or servicing is done, either as a complete article or incorporated as a material, or as an integral or component part of tangible personal property produced for sale by such person in the business of manufacturing, assembling, constructing, refining or processing; (5) sales of drugs, medical and dental preparations, and similar materials to be directly consumed in professional use by doctors, hospitals, embalmers, and tonsorial parlors;

(6) sales of tangible personal property to be directly consumed by the purchaser in the business of industrial cleaning; and/or (7) sales of any tangible personal property to be directly consumed by the purchaser directly in the business of rendering public utility service: Provided, however, That no sale to a division, subdivision, agency, instrumentality, unit or department of government shall be deemed to be included within this definition: Provided further, That price or quantity shall not be considered in the application of this definition: Provided further, That it shall be immaterial in the application of this definition whether sales are made from stock or upon order; Provided further, That in the application of this definition it shall be immaterial whether or not the seller is the manufacturer or producer of the property sold: Provided further, That the term "consumed" as used herein shall refer only to the immediate dissipation or expenditure by combustion, use, or application, and shall not mean or include, the obsolescence, discarding, disuse, depreciation, damage, wear, or breakage, of tools, dies, equipment, rolling stock or its accessories, machinery, or furnishings.

(b) With respect to that part of the gross income of every person which is received from display advertising, the tax shall be equal to one-half of one per cent (1/2%) of such part of the gross income. The term "display advertising," as used herein, shall not be construed to include any sale or rental of tangible property nor any personal or professional service in connection with such advertising: Provided, however, That the term "display advertising," shall include outdoor poster and painted display advertising.

(c) With respect to that part of the gross income of every person who is a retail merchant as defined in this

act which is received from selling at retail, the tax shall be equal to one-half of one per cent (1/2%) of such part of the gross income.

(d) With respect to that part of the gross income of every person which is received from the business of dry cleaning and laundering, the tax shall be equal to one-half of one per cent (1/2%) of such part of the gross income.

(e) With respect to that part of the gross income of every person received from producing, transmitting, furnishing, wholesaling, and/or retailing electrical energy; or producing, transporting, furnishing, wholesaling, and/or retailing artificial gas, natural gas, or mixtures of artificial and natural gas, operating a steam and/or electric railway, street car line, motor vehicle, steam or motor boat, or any other vehicle for the transportation of freight, express, and/or passengers for hire; operating a pipe line for the transportation of any commodity for hire; operating any telephone and/or telegraph line; operating any water or sewerage system; or operating any other utility not expressly provided for in this section, the tax shall be equal to two per cent (2%) of such part of the gross income.

(f) With respect to that part of the gross income of every person received from operating any bank, trust company, building and loan association, insurance and/or casualty company, finance company, small loan company, or any other business of similar nature, including all others mentioned in subsection (n) of Section 1, the tax shall be equal to two per cent (2%) of such part of the gross income.

(g) With respect to that part of the gross income of every person which is received from any source not

enumerated in subsections (a) to (f) inclusive, of this section, including, but not in limitation of the foregoing, gross income from professional services, personal services, or services of any character whatsoever, sales of real estate, rentals, all funds received for the performance of contracts, all funds received from the investment of capital, all receipts from retail sales and all receipts received from any source whatsoever, the tax shall be equal to two per cent (2%) of such part of the gross income. The term "retail sales" shall mean any sale of any property not included within the definitions of "wholesale sales" and "selling at retail."

SEC. 22. Subsection (m) of Section 6, Acts of 1933, Chapter 50, as last amended by Acts 1959, c. 375, s. 1, is amended to read as follows:

(m) All amounts of retailers' excise taxes now or hereafter imposed by the United States solely on the sale at retail of tangible personal property and collected by a retail merchant, as defined in subsection (j) of section 1 of the Gross Income Tax Act of 1933, as amended, from the buyer as a separate item in addition to the price of the property sold, and which is remitted by such retail merchants to the taxing authority. All amounts of manufacturers' excise tax now or hereafter imposed by the United States on motor vehicles, motor vehicle bodies and chassis, parts and accessories therefor and tires, tubes for tires, tread rubber and laminated tires, provided that such tax is separately stated by the taxpayer (whether a manufacturer, wholesaler or retail merchant) either as added to the price or as otherwise included in the price at which such property is sold by the taxpayer.

SEC. 23. The title of Chapter 50 of the Acts of 1933, which 1933 Act was last amended by Chapter 293 of the

Act of 1961, is amended to read as f
cerning taxation."

SEC. 24. If any of the provision
22 of this Act or the application th
circumstance is held invalid, such
affect other provisions or applicati
can be given effect without the in
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declared to be severable.

SEC. 25. Sections 21 and 22 o
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23 and 24 of this act shall be in full
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reason of an emergency
ect thereof.

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IN THE

Supreme Court of the United States

October Term, 1963

No. 803

DALLAS SELLS and
COMMITTEE ON POLITICAL
EDUCATION, *Appellants*,

v.

MATTHEW WELSH, as Governor of
The State of Indiana and as a Member
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JAMES C. COURTNEY, as Revenue
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EDWIN K. STEERS, as Attorney
General of the State of Indiana,
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State of Indiana, as Members of the
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INDIANA DEPARTMENT OF STATE
REVENUE, *Appellees*.

On Appeal from the Supreme Court of Indiana

MOTION TO DISMISS OF APPELLEES MATTHEW WELSH AND JAMES C. COURTNEY

Alan W. Boyd,
1313 Merchants Bank Building,
Indianapolis 4, Indiana,
George J. Zazas,
Raymond W. Gray,
Robert L. McLaughlin,
1313 Merchants Bank Building,
Indianapolis 4, Indiana,
Attorneys for Appellees
Welsh and Courtney.

Barnes, Hickam, Pantzer & Boyd,
1313 Merchants Bank Building,
Indianapolis 4, Indiana,
Of Counsel.

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ON APPEAL FROM THE SUPREME COURT OF INDIANA

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Appellees Matthew E. Welsh, as Governor of the State of Indiana and as a Member of the Indiana Revenue Board,

and James C. Courtney, as Revenue Commissioner of the State of Indiana, respectfully move this Court to dismiss the appeal herein taken by Appellants Dallas Sells and Committee on Political Education from the Supreme Court of Indiana, upon the ground that the appeal does not present a substantial federal question.

This is an appeal from a decision of the Supreme Court of Indiana holding the Indiana Gross Retail Tax and Use Tax Act, imposing general sales and use taxes (Ch. 30, Acts 1963 Spec. Sess., Burns' Ind. Stat. Ann. § 64-2651 et seq.), valid except in certain particulars not relevant here.

By questions 1 and 2 presented by their Jurisdictional Statement, Appellants urge that rights guaranteed them by the due process clause of the 14th Amendment were infringed by the refusal of the Supreme Court of Indiana to permit the introduction of parol testimony and to consult legislative journals for the purpose of ascertaining that the act in question was not passed by "a majority of all members elected to each House" as required by Article 4, Section 25 of the Constitution of Indiana.

The underlying substantive questions which Appellants sought to have determined by the Supreme Court of Indiana were:

> 1. Whether the long standing rule that a house of the General Assembly, once it has enacted a bill by a constitutional majority, may approve amendments thereto by simple majority concurrence in amendments made in the other house or in conference (*McCulloch v. State*, 11 Ind. 424 (1859)) does not apply when the amendments are so extensive as to change the substance of the bill.

2. What effect Article 5, Section 21 of the Constitution of Indiana, which permits the Lieutenant Governor to cast the deciding vote in case of a tie in the Senate, has upon the requirement that bills be passed by a majority of all members elected to the Senate, it being impossible to comply with the latter requirement in any case when, as here, a tie vote occurs. (See Opinion on Motion for Leave to File Amended Petition for Rehearing and For Stay, App. C to Jurisdictional Statement)

Obviously, had the Supreme Court of Indiana decided these questions, which involve purely the construction of the Constitution of Indiana, its decision, either way, would present no issue reviewable by this Court. Yet Appellants claim that the refusal of that court to inquire as to the manner in which the Act was passed and to determine that it was adopted in violation of the Indiana Constitution somehow presents a federal constitutional question.

It is apparent from the opinion of the Supreme Court of Indiana that its decision on this point was based upon adherence to the principle that "the proper authentication of an enrolled act is proof of its proper enactment, with the exception that fraud practiced upon the legislature or its presiding officers would vitiate the certification. * * * No fraud of that character is charged in this case." See opinion of the Supreme Court of Indiana, Appellants' Jurisdictional Statement, Appendix A, page x. Judicial refusal to go behind the certifications of the presiding officers of the houses of the General Assembly to inquire as to the procedures by which the legislature adopted a statute dates, in Indiana, from the carefully considered decision in *Evans v. Browne*, 30 Ind. 514 (1869), wherein it was held that even the journals of the legislature would

not be examined to impeach an authenticated act. Consistent adherence to the rule is evidenced by the statement of the Court and the authorities cited by it in *State ex rel. Cline v. Schricker*, 228 Ind. 41, 46-7, 88 N. E. (2d) 746, 748 (1949):

"Since the decision in *Evans, Auditor v. Browne* (1869), 30 Ind. 514, *supra*, this court has consistently held that a proper authentication of an enrolled act is conclusive, as a matter of law, that the act was duly passed in conformity to the constitution. *Bender v. State* (1876), 53 Ind. 254; *Board of Commissioners of Madison County v. Burford* (1883), 93 Ind. 383; *Stout v. Board of Commissioners of Grant County* (1886), 107 Ind. 343, 8 N. E. 222; *Hovey, Governor v. State ex rel. Carson* (1889), 119 Ind. 395, 21 N. E. 21; *State ex rel. Board of Commissioners of Benton County v. Boice* (1895), 140 Ind. 506, 39 N. E. 64, 40 N. E. 113; *Western Union Telegraph Co. v. Taggart, Auditor* (1895), 141 Ind. 281, 40 N. E. 1051; *Lewis v. State* (1897), 148 Ind. 346, 47 N. E. 675; *State ex rel. Colbert v. Wheeler* (1909), 172 Ind. 578, 89 N. E. 1, *supra*. This is a rule of substantive law and not of evidence, and there is no pleading known to the law by which the existence of an act can be put in issue and tried as a question of fact. *Evans, Auditor v. Browne* (1869), 30 Ind. 514, *supra; State ex rel. Colbert v. Wheeler* (1909), 172 Ind. 578, 89 N. E. 1, *supra; McCulloch v. State* (1858), 11 Ind. 424; *Hovey, Governor v. State* (1889), 119 Ind. 395, 21 N. E. 21, *supra*.

"Nor may this court examine into a charge of fraud committed by the General Assembly or the members thereof. 'The judiciary, for constitutional reasons and

> upon the grounds of public policy, have invariably declined to inquire into the motives which prompted the official acts of the legislature or of the executive; and courts will not hear and determine a charge of fraud and corruption to annul or to supply legislative action. *State ex rel. Ketcham v. Terre Haute & Indianapolis Railroad Co.* (1906), 166 Ind. 580, 583, 584, 77 N. E. 1077. See also *McCulloch v. State* (1858), 11 Ind. 424, *supra.*"

See also, *Mogilner v. Metropolitan Plan Comm.*, 236 Ind. 298, 321, 140 N. E. (2d) 220, 231 (1957).

The rule, although not uniformly observed, is not unique to Indiana. See 82 C.J.S. Statutes, Sec. 83 and cases there collected. It is, indeed, the same rule which this Court observes in respect to acts of Congress (See *Marshall Field & Co. v. Clark*, 143 U. S. 649 (1892), relying, in part, upon *Evans v. Browne, supra; Leser v. Garret*, 258 U. S. 130, 137 (1922)) and to those of territorial legislatures, *Harwood v. Wentworth*, 162 U. S. 547, 562 (1896). The continuing vitality of the rule was recently recognized in *Baker v. Carr*, 369 U. S. 186, 214 (1962). This same rule is applied by the federal courts in respect to state statutes in the absence of contrary state authority. See *Ames v. Union Pacific Ry.*, 64 Fed. 165 (D. Neb., 1894), aff'd sub nom.: *Smyth v. Ames*, 169 U. S. 466, mod. on other grounds, 171 U. S. 361.

It is inconceivable that in following a rule of judicial restraint so firmly established and widely observed, the Supreme Court of Indiana offended the requirements of the 14th Amendment.

As their question 3 Appellants assert that Sec. 4(b) (1) of the Act (Burns' Ind. Stat. § 64-2654(b)(1)) violates the

equal protection clause of the 14th Amendment to the Constitution of the United States in exempting the following transactions from tax:

> "Sales to farmers and other persons occupationally engaged in the business of producing food and commodities for human, animal or poultry consumption either for sale or for further use in producing such food and commodities for sale, of animal and poultry life to be used by the purchaser for such production of food and commodities, feed for such animals and poultry, and seeds, plants, fertilizers, fungicides, insecticides and other tangible personal property to be used for such production of food and commodities."

No substantial federal question is presented by this claim. This Court has consistently held that the federal constitution does not compel states to adopt an "iron rule of equal taxation, nor prevent variety in methods of taxation or discretion in the selection of subjects, or classification for purposes of taxation of either properties, businesses, trades, callings, or occupations." *Brown-Forman Co. v. Commonwealth of Kentucky*, 217 U. S. 563, 572 (1918). See also, e.g., *Bell's Gap R. R. v. Pennsylvania*, 134 U. S. 232 (1890); *Magoun v. Illinois Trust and Savings Bank*, 170 U. S. 283 (1898); *Quong Wing v. Kirkendall*, 223 U. S. 59 (1912); *State Board of Tax Commissioners of Indiana v. Jackson*, 283 U. S. 527 (1931); *Carmichael v. Southern Coal and Coke Co.*, 301 U. S. 495 (1937); *Walters v. St. Louis*, 347 U. S. 231 (1954); *Allied Stores of Ohio, Inc. v. Bowers*, 358 U. S. 522 (1959).

All the 14th Amendment requires is that states proceed on a rational basis in establishing classifications for purposes of taxation. If a classification rests upon any reasonable consideration of policy, and is not purely arbitrary,

there is no denial of equal protection of the laws. *Brown-Forman Co. v. Kentucky*, 217 U. S. 563, 573 (1910); *Allied Stores of Ohio, Inc. v. Bowers*, 358 U. S. 522, 527 (1959).

Without question, the classification established by Sec. 4(b)(1) is reasonable and bears a direct relation to the object of the legislation. The Indiana tax, like virtually all sales taxes, is designed to reach the ultimate retail transaction of sale and purchase and to avoid placing multiple taxes upon the sale of a single product by exempting from taxation sales of products for resale or for use in the production of other products which will ultimately be sold in taxable retail transactions. The tax is expressly imposed only upon "transactions of retail merchants constituting selling at retail." (Burns' Ind. Stat. § 64-2651; Appendix D, Appellant's Jurisdictional Statement, p. xxxiv.) It is doubtful that Section 4(b)(1) was even necessary to prevent imposition of the tax upon the transactions described since that section simply establishes that the sale of certain enumerated products to farmers and others similarly occupationally engaged for use in the production of food and commodities for sale or further use does not constitute "selling at retail." The subsequent sale of the food and commodities themselves will instead produce the taxable event. Thus, this section is entirely consistent with the basic purpose of the Act—to tax the ultimate retail transaction only. It is to be noted that the exemption extends only to sales of items to be used in further production and does not exempt farmers or others as a class from paying the tax upon true retail transactions.

Appellants admit on pages 17-18 of their Jurisdictional Statement that the Supreme Court of Indiana expressly interpreted Sec. 4(b)(1) as exempting wholesale sales only. Appellants' claim that Section 4(b)(1) is invalid rests

entirely upon the contention that this interpretation is "fallacious" and that the real effect of the section is to exempt *retail* sales to farmers. This contention is wholly without substance. This Court is, of course, bound by the construction given the section by the Supreme Court of Indiana. *Jones v. Prairie Oil & Gas Company*, 273 U. S. 195 (1927). As construed by that court, this section violates no federal right.

The reasonableness of the classification in Sec. 4(b)(1) is confirmed by examination of other retail sales tax acts. Thirty-one such statutes have provisions which, like Sec. 4(b)(1), specifically exempt sales of certain products for use by a farmer or similarly occupied individual in the production of agricultural commodities. See:

Alabama (Ala. Code T. 51 § 786 (34));
Arkansas (Ark. Rev. Stat. § 84-1904 (r));
California (Cal. Revenue and Taxation Code § 6358);
Connecticut (Conn. Gen. Stat. § 12-412 (e));
Colorado (Col. Rev. Stat. § 128-6-14(6)(8));
District of Columbia (D. C. Code, § 47-2605 (i));
Florida (Flor. Stat. § 212.08(6));
Georgia (Ga. Code Ann. § 92-2150.3(c)(2)(b));
Iowa (Iowa Code Ann. § 422.42(3));
Kansas (Kan. Gen. Stat. § 79-3602(k));
Kentucky (Ky. Rev. Stat. § 139.480 (4-7));
Louisiana (La. Rev. Stat T. 46 § 305);
Maine (Maine Rev. Stat. Ch. 17 § 10 (VII));

Maryland (Md. Code Art. 81, § 36);

Michigan (Mich. Comp. Laws § 205.59 a(f));

Mississippi (Miss. Code § 10116(b));

Missouri (Mo. Rev. Stat. § 144.030(21));

Nevada (Nev. Rev. Stat. § 372.280);

New Mexico (N. Mex. Stat. § 72-16-4.5);

North Carolina (N. Car. Gen. Stat. § 105-164.13);

North Dakota (N. Dak. Rev. Code § 56-39-03(8));

Oklahoma (Okla. Stat. Art. 13, § 1312(a));

Pennsylvania (Pa. Stat. Ann. § 3407-102(o));

South Carolina (S. Car. Code § 65-1404 (3-5));

Tennessee (Tenn. Code § 67-3012);

Texas (Tex. Rev. Civ. Stat. Art. 20.04(M));

Utah (Utah Code Ann. § 59-15-2(f));

Washington (Wash. Rev. Code § 82.04.330);

West Virginia (W. Va. Code Ch. 11, Art. 15, § 9(8));

Wisconsin (Wis. Stat. Ann. § 77.54(3));

Wyoming (Wyo. Stat. § 39.287(f)).

All these statutes recognize that transactions of the kind exempted by Section 4(b)(1) of the Indiana Act are not the retail sales upon which the tax is levied. This is the precise significance of Sec. 4(b)(1), as interpreted by the Indiana Supreme Court. Clearly, the exemption of such transactions does not involve a denial of equal protection of the laws to anyone.

No federal question of substance having been presented, the appeal should be dismissed.

ALAN W. BOYD,
1313 Merchants Bank Building,
Indianapolis 4, Indiana,

GEORGE J. ZAZAS,
RAYMOND W. GRAY,
ROBERT L. MCLAUGHLIN,
1313 Merchants Bank Building,
Indianapolis 4, Indiana,

Attorneys for Appellees Welsh and Courtney.

BARNES, HICKAM, PANTZER & BOYD,
1313 Merchants Bank Building,
Indianapolis 4, Indiana,

Of Counsel.

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ON APPEAL FROM THE SUPREME COURT OF INDIANA

APPELLANTS' BRIEF IN REPLY TO APPELLEES' MOTION TO DISMISS

LLOYD L. DEWESTER, JR.,
900 Circle Tower
Indianapolis, Indiana
Attorney for Appellants.

C. E. Pauley & Co., Inc., Indianapolis

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 803

DALLAS SELLS and
COMMITTEE ON POLITICAL EDUCATION,
Appellants,

v.

MATTHEW WELSH, as Governor of the State of Indiana and as a Member of the Indiana Revenue Board,
JAMES C. COURTNEY, as Revenue Commissioner of the State of Indiana,
EDWIN K. STEERS, as Attorney General of the State of Indiana,
ROBERT HUGHES, Treasurer of The State of Indiana, and
DOROTHY GARDNER, Auditor of The State of Indiana, as Members of the Indiana Revenue Board, and
INDIANA DEPARTMENT OF STATE REVENUE,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF INDIANA

APPELLANTS' BRIEF IN REPLY TO APPELLEES' MOTION TO DISMISS

Pursuant to Rule 16(3) of this Court, Appellants in the above entitled cause file this brief in opposition to the Motion to Dismiss of Appellees Matthew Welsh and James C. Courtney (hereinafter called "Motion").

STATEMENT

In the motion, it is said the federal claims, presented in questions 1 and 2 of our Jurisdictional Statement, are not substantial for the following reasons: (a) Certain underlying substantive questions, evaded by the Supreme Court of Indiana in refusing to consider evidence of the passage of the Indiana Acts of 1963 (Spec. Sess.), ch. 30, Sec. 1 through 25 (Jurisdictional Statement, App. D; hereinafter called "the Act" or "House Enrolled Act No. 1226"), "involve purely the construction of the Constitution of Indiana" (Motion, p. 3); (b) Judicial refusal to consider evidence of passage of House Enrolled Act No. 1226 does not offend the 14th Amendment because such refusal is "so firmly established and widely observed" (Motion, p. 5).

The Motion asserts further that question 3 is not substantial, since (a) Sec. 4(b)(1) of the Act, exempting certain sales to farmers, is a reasonable classification because the Supreme Court of Indiana construed it as exempting wholesale sales only (Motion, p. 7), and (b) this Court is bound by that Court's construction (Motion, p. 8).

These contentions will be discussed in substantially the preceding order under the heading "Argument" herein.

ARGUMENT

I.

Taking of Property, pursuant to a taxation statute, not passed into law, is a denial of due process of law.

Appellants sought to have the Supreme Court of Indiana determine the substantive question presented by question 2 of this appeal:

> Whether passage of the Act, without the vote of a majority of all members elected to both houses of the Indiana General Assembly, as required by Article 4, Section 25, Constitution of Indiana, deprives Appellants of their property without due process of law, under the Constitution of the United States, Amendment 14, Section 1? (Jurisdictional Statement, p. 4)

In an attempt to belittle the merit of this question, Appellees now offer two different so-called underlying substantive questions (Motion, pps. 2, 3).

First, it is implied that the Act was originally passed by a majority of members elect in the Senate, subsequently amended, and such amended Act was approved by simple majority concurrence, which complies with the requirement of passage by a constitutional majority.

The evidence of passage shows, however, that the Act was not an amendment of a prior bill passed by a constitutional majority. It was a completely new bill when approved by so-called simple majority concurrence. Specifically, the Senate Journal shows: (a) that a bill, entitled, "A bill for an Act to Amend the Gross Income Tax Act of 1933 in relation to the classifications of theaters for taxing purposes," passed the Indiana Senate by a vote

of 28 to 21, on March 25, 1963 (Journal of the Senate, 1963 Spec. Sess., pps. 237, 238); (b) that, on April 18, 1963, every word in the bill, passed March 25, 1963, was struck out, following the enacting clause; that the Act in question, consisting of 25 new sections was substituted therefor, and that this Act was purportedly passed by 24 elected members of the Senate, plus the Lieutenant Governor (Journal of the Senate, 1963 Spec. Sess., pps. 651-719).

Second, Appellees imply that a constitutional majority may not have been required for passage of the Act, since Article 5, Sec. 21, Indiana Constitution, provides:

> ". . . whenever the Senate shall be equally divided he (the Lieutenant Governor) shall give the casting vote."

However, all this language means is that the Lieutenant Governor shall cast[1] a vote in case of a tie. It is significant that, if the Lieutenant Governor's vote is counted as a vote of a member elect, there still were not 26 votes for the Act—the required constitutional majority.

Clearly Article 5, Section 21 does not abolish the requirement of passage by a constitutional majority (Article 4, Sec. 25, Indiana Constitution) whenever the Lieutenant Governor votes for a bill in case of a tie. If that were so, a bill could become a law by a mere vote of 2 to 1 in the situation where the Lieutenant Governor voted for the bill, breaking a one, one tie. No such absurdity was intended by the framers of the Indiana Constitution of 1851.[2]

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1. Webster's New Collegiate Dictionary defines "cast" to mean: "to give (a vote)".

2. Thus, Mr. Read, a delegate to the Constitutional Convention of 1850, said:

> "If there had been a single reform principle introduced into the lately made constitutions, this of requiring a majority of all members to pass a

The fact that this Act was not passed by a majority of all members elected to the Indiana Senate remains. If the Supreme Court of Indiana had looked at this fact, it would have been compelled to state, as it stated in *McCulloch v. State* (1859) 11 Ind. 424, 435 that:

> "... where the journals, on their face, show that a bill on its passage did not receive, in its favor, a majority of all members elected, as prescribed by the constitution, the whole legislative proceeding would be a nullity; because, if the requisite number do not vote in the affirmative upon final passage, there is a defect of power, and no bill so passed can ever have the force of the law."

Accordingly, where a bill had not received the requisite votes, that Court held the bill invalid in *Cordell v. State* (1864) 22 Ind. 1.

Other state courts have held laws invalid where the facts of passage show the bill failed to pass. See 50 Am. Jur. Statutes, Sec. 84, pps. 95, 96. However, without reversing *McCulloch* or *Cordell*, the Supreme Court of Indiana has refused to look at the evidence of passage since 1869 (*Evans, Auditor v. Browne* (1869), 30 Ind. 514), even where, as here, the journals show the bill failed to pass. Thus, judicial restraint can make a bill valid in spite of the fact that it never was passed into law.

Notwithstanding the doctrine of judicial restraint, the due process clause of the 14th Amendment refers to and includes the law of the land in each state (see Jurisdictional

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law, is one of the most valuable in preventing irresponsible legislation. When the ayes and noes are required to be entered upon the journals for passage of every bill, and when a majority of all members must give and assent thereto before it becomes a law, there will be safe and careful legislation." (Debates in Indiana Convention 1850, Vol. 2, Page 1085).

Statement, pps. 15-17). That law requires that the people consent to be taxed, in a prescribed manner (Article 4, Sec. 25, Constitution of Indiana), before the state has power to levy a particular tax. The right to have laws passed with the consent of the governed is so basic that it is "implicit in the concept of ordered liberty." *Palko v. Connecticut* (1937), 302 U. S. 319, 325. It, in fact, is the most basic right of the people in a free society.

Moreover, the principle stated in *Miller Bros. Co. v. Maryland* (1954), 347 U. S. 341, 342 is applicable to the case at hand:

> "It is a venerable if trite observation that seizure of property by the State under pretext of taxation when there is no jurisdiction or power to tax is simple confiscation and a denial of due process of law."

Here the state is seizing property under pretext of taxation because the executive has not been granted the state's inherent power to tax by a duly enacted law. This does not differ in principle from the *Miller* case where the executive forced out-of-state vendors to collect and remit a use tax in a place where the executive had no power to tax.

Clearly question 2 presents a substantial federal claim, under the due process clause, 14th Amendment. It does not involve "purely the construction of the Constitution of Indiana."

II.

Judicial refusal to consider evidence, concerning passage of a purported law, when laws are required to be passed by a constitutional majority, is a denial of due process of law.

The Supreme Court of Indiana evaded a decision on the merits of question 2 by using the so-called doctrine of judicial restraint. In essence such doctrine says: ". . . the proper authentication of an enrolled Act is proof of its proper enactment, with the exception of fraud. . . ." (Jurisdictional Statement, App. A, p. x.) Appellees urge that: "It is inconceivable that in following a rule of judicial restraint so firmly established and widely observed, the Supreme Court of Indiana offended the requirements of the 14th Amendment" (Motion, p. 5).

Appellees citations show, however, that judicial restraint is neither "firmly established" nor "widely observed". For example, in 82 CJS Statutes, Sec. 83, p. 136 (cited in Motion, p. 5) it is said:

> "In England, where there is no written constitution and parliament is supreme, an enrolled statute is conclusive evidence of its passage and validity. . . . In the United States . . . there is a strong conflict of opinion as to whether an Act so enrolled is conclusive evidence as to the correctness of its contents and as to its passage in the mode prescribed by law."

Again, *Marshall Field & Co. v. Clark* (1892) 143 U. S. 649 is cited by Appellees (Motion, p. 5) to show that this Court observes the judicial restraint doctrine in respect to Acts of Congress. An examination of that opinion indicates, however, that such observance is based upon the lack of Federal Constitutional limitations, comparable to

Article 4, Sec. 25, Indiana Constitution, with respect to the enactment process. Thus, at pps. 677, 678 of 143 U. S., noting that contrary state decisions "rested upon constitutional . . . provisions . . . which . . . required or authorized the Court to go behind the enrolled Act", this Court quoted the following, from *People v. Barnes*, 35 Ill. 121, with approval:

> "Were it not for the somewhat peculiar provision of our constitution, which requires that all bills before they can become laws shall be read three several times in each house, *and shall be passed by a vote of a majority of all members elect*, a bill thus signed and approved would be conclusive of its validity and binding force as a law. . . . " (Emphasis ours)

Any semblance of observance disappears when a federal constitutional limitation, similar to Article 4, Sec. 25, Indiana Constitution, is present. In *United States v. Ballin* (1891) 144 U. S. 1, for instance, this Court did not exercise judicial restraint to evade a decision on the merits The House Journal was examined to determine whether a quorum was present for passage of a bill, as required by Article I, Sec. 5, Constitution of the United States. At p. 6 of 144 U. S., this Court stated:

> "As appears from the journal, at the time this bill was passed in the house there was present a majority, a quorum, and the house was authorized to transact any and all business. . . . the question is, whether, a quorum being present, the bill received a sufficient number of votes; and here the general rule of all parliamentary bodies is that, when a quorum is present, the act of a majority of the quorum is the act of the body. This has been the rule for all time, except so far as in any given case

> the terms of the organic act under which the body is assembled have prescribed specific limitations. As, for instance, *in those States where the constitution provides a majority of all members elected to either house shall be necessary for passage of any bill.* No such limitation is found in the Federal Constitution, and therefore the general law of such bodies obtains." (Emphasis added)

But such a limitation is found in the Constitution of Indiana, Article 4, Sec. 25.

Appellees cite *Baker v. Carr* (1962), 369 U. S. 186 (Motion, p. 5) to show the continuing validity of the rule of restraint in this Court. At pps. 514-515, 369 U. S., referring to the *Marshall Field case*, supra, this Court remarked:

> "But it is not true that courts will never delve into a legislator's records upon such a quest (whether a bill, as passed, complied with all requisite formalities); If the enrolled statute lacks an effective date, a court will not hesitate to seek it in the legislative journals. . . ."

Indeed *Baker v. Carr* stands for the principle that this Court will no longer evade a decision on the merits, under the doctrine of judicial restraint, where the legislature has violated a specific constitutional right. Thus, Mr. Justice Douglas, at p. 249 of 369 U. S., concurring, wrote:

> "It is ludicrous to preclude judicial relief when a mainspring of representative government is impaired. Legislators have no immunity from the constitution. The legislatures of our land should be made as responsive to the Constitution of the United States as are the citizens who elect the legislators."

For similar reasons, many courts have rejected the rule of restraint, and examine the journals to ascertain the facts of passage. See 50 Am. Jur. Statutes, Sec. 84, supra. For example, in *Illinois v. Illinois Cent. R. Co.* (1888), 33 F. 730, 762, is the following quotation from *Spangler v. Jacoby*, 14 Ill. 297:

> "It certainly was not the intention of the framers of the constitution that the signatures of the speakers and executive should furnish conclusive evidence of the passage of a law. The presumption, indeed, is that an Act thus verified became a law pursuant to the requirements of the constitution; but that presumption may be overthrown. If the journal is lost or destroyed, this presumption will sustain the law, for it will be contended that the proper entry was made in the journal; but when the journal is in existence, and it fails to show that the Act was passed in the mode prescribed by the constitution, the presumption is overcome, and the Act must fall."

It may be appropriate to preclude judicial relief where the legislature violates rules of its own creation, adopted for its own convenience for the purpose of regulating the passage of laws. *United States v. Ballin*, supra, 144 U. S. 1. It may also be appropriate to preclude judicial relief where the legislature is supreme and there is no written constitution as in England. But it is palpably arbitrary to preclude judicial relief where the legislative body has transcended the constitutional limits of its power. To presume a law was constitutionally passed, when it was not in fact so passed, denies the people a fair opportunity to redress a fundamental wrong.

It is submitted that judicial fiat "may not take place of fact in the . . . determination of issues involving life,

liberty or property." *Western & Atlantic Railroad Co. v. Henderson* (1929), 279 U. S. 639; *Manley v. Georgia* (1928), 279 U. S. 1; *Bailey v. Alabama* (1911), 219 U. S. 219. The presumption of constitutional passage of a law, when such law was passed contrary to an explicit constitutional limitation, is a denial of due process of law, 14th Amendment, as urged in question 1 of this appeal.

III.

An arbitrary classification in a taxation statute is a denial of the equal protection of the laws and this Court is not bound by a state court finding that such classification is reasonable.

Sec. 4(b)(1) of the Act exempts "Sales to farmers and other persons occupationally engaged in the business of producing food . . ." from application of the sales tax levied by the Act (Jurisdictional Statement. App. D, p. xxxix). Such exemption extends to all ". . . tangible personal property to be used for such production. . . ." (Jurisdictional Statement, App. D, p. xxxix.)

It is true, as urged by Appellees (Motion, p. 6), that a state may adopt reasonable classifications of business and occupations for purposes of taxation. But it is equally true, as stated in *Allied Stores of Ohio v. Bowers* (1959), 358 U. S. 522, 527, cited by Appellees (Motion, pps. 6, 7), that:

> ". . . there is a point beyond which the State cannot go without violating the Equal Protection Clause. The State must proceed upon a rational basis and may not resort to a classification that is palpably arbitrary. The rule often has been stated to be that the classification must rest upon some ground of difference having a fair and substantial relation to the object of the legislation."

See also the following cases, cited at p. 18, Jurisdictional Statement:

Quaker City Cab Co. v. Pennsylvania (1928), 277 U. S. 389;

Louisville Gas & Electric Co. v. Coleman (1928), 277 U. S. 32;

Colgate v. Harvey (1935), 296 U. S. 405.

It is also true that the Supreme Court of Indiana expressly interpreted Sec. 4(b)(1) as exempting wholesale sales only; as pointed out by Appellees (Motion, p. 7). But it is not true that this Court is bound by the construction given the section by the Supreme Court of Indiana (Motion, p. 8) for all purposes. For the purpose of determining whether the state statute assailed violates the Federal Constitution, "a characterization of the tax by the state court is not binding here." *Quaker City Cab Co. v. Pennsylvania*, supra, 277 U. S. 389, 401; *Louisville Gas & E. Co. v. Coleman*, supra, 277 U. S. 32, 38.

The question remains whether the classification set up by Sec. 4(b)(1) is reasonable and rests upon some ground of difference having a fair and substantial relation to the [redacted] of the legislation.

The object of the Act is to impose a sales tax upon "transactions of retail merchants constituting selling at retail." (Act, Sec. 1; Jurisdictional Statement, App. D, p. xxxiv.) Since the sales tax "shall be paid by the purchaser to the retail merchant. . . ." (Act, Sec. 1; Jurisdictional Statement, App. D, p. xxxiv), it is clear that the purchaser is the party taxed in the transaction.

It is said:

> "It is doubtful that Section 4 (b) (1) was even necessary to prevent imposition of the tax upon the transactions described since that section simply establishes that the sale of certain enumerated products to farmers and others similarly occupationally engaged for use in the production of food and commodities for sale or further use does not constitute 'selling at retail' ". (Motion, p. 7).

If that is true, why did the legislature put such a cumbersome section in the Act? It is absurd to assume that the legislature drafted an unnecessary section.

More important, however, is the circuitous nature of Appellees' argument in the light of the practical impact of the exemption. If a salesman, for example, purchases an automobile at retail for use in his business, he must pay the tax. A farmer, on the other hand, purchasing a tractor at retail for use in his business, will not be taxed. In each case, the sale of the purchaser's business product will produce one of Appellees' so-called ultimate or true retail transactions—a "subsequent sale of food and commodities" which "will instead produce the taxable event" (Motion, p. 7).

If this reasoning is applied to all retail purchasers, under similar circumstances, the object of the legislation would be defeated. The fact is, if this Act is to produce any revenue at all, it must, as it does, arbitrarily select an event in this production circle upon which to levy the tax. That event is the retail sale.

No quantity of double talk can rationalize the fact that the farmer, when engaged in the taxable event, is exempt while other purchasers are not. This is class legislation at its worst.

Appellees' list of statutes, on pages 8-9 of their motion, merely illustrates the magnitude of this invidious type of discrimination. Moreover, Appellees have not shown that the classification has a reasonable object, such as "a statute which encourages the location within the State of needed and useful industries by exempting them, though not also others. . . ." *Allied Stores of Ohio v. Bowers*, supra, 358 U. S. 522, 528.

Thus, the exemption of certain retail sales to farmers is papably arbitrary and does involve a denial of equal protection of the laws to Appellants. Question 3 presents a substantial federal claim.

CONCLUSION

It is respectfully urged that Appellees' Motion to Dismiss be denied and that the Court permit briefs to be filed and oral argument to be heard on the substantial federal questions presented by this appeal.

Respectfully submitted,

LLOYD L. DEWESTER, JR.
Attorney for Appellants
900 Circle Tower
Indianapolis, Indiana
ME 9-6306

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